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A Reintroduction: Survival Skills for Post-Conviction Practice in South Carolina

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A REINTRODUCTION: SURVIVAL SKILLS FOR POST-CONVICTION PRACTICE IN SOUTH CAROLINA

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I. INTRODUCTION

Post-conviction practice is an important safeguard against unjust, unconstitutional, and erroneous convictions. Despite the importance of the topic, the subject has historically received scant attention from legal commentators.[1] In 1994, "An Introduction to Post-Conviction Remedies, Practice And Procedure in South Carolina" was published.[2] At the time, very little had been written about the post-conviction remedies available to prisoners in South Carolina, and the article was intended to introduce appointed counsel and pro se inmates to the various post-conviction remedies available.[3] In the forty years since its initial enactment, South Carolina's Post-Conviction Relief (PCR) Act was amended three times, the South

1. *See* Vance L. Cowden, *Indigent Defense Services for Post-Conviction Relief in South Carolina: Current Problems and Potential Remedies*, 42 S.C. L. REV. 417, 420 (1990) (describing PCR as "the redheaded stepchild of the legal system").

2. *See* John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. REV. 235 (1994).

3. *Id.* at 237.

Carolina Supreme Court issued a number of significant rulings relevant to post-conviction practice, and there were a number of federal and state legal developments concerning procedural and substantive aspects of post-conviction practice. And still, this topic remains minimally discussed in South Carolina. Thus, our purpose here is to build upon the initial "Introduction" in the following three ways: (1) explain the statutory amendments to South Carolina's PCR Act that have occurred since 1994; (2) provide an updated discussion of post-conviction practice and procedure in South Carolina; and (3) provide three appendices: Appendix A is a comprehensive list of successful PCR cases in South Carolina under the current statutory scheme (excluding successful ineffective assistance of counsel claims); Appendix B is a summary of all successful ineffective assistance of counsel claims in South Carolina since 1984;[4] and Appendix C provides a set of sample forms, including various applications for post-conviction relief, sample motions for discovery, and a sample letter under the Freedom of Information Act.[5]

Part II of this article provides a brief historical overview of post-conviction relief in South Carolina, followed by a similarly brief introduction to South Carolina's current post-conviction relief process in Part III. Then, Parts IV through VIII explain South Carolina's post-conviction relief procedure in detail.

II. A BRIEF HISTORY OF POST-CONVICTION RELIEF IN SOUTH CAROLINA

The common law writ of habeas corpus was a notion imported to the colonies from England where it was considered "the most celebrated writ in English law."[6] Habeas corpus was "[r]eceived into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, § 9, cl. 2, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c. 20, § 14, 1 Stat. 81-82, [and] was early confirmed by

4. Apps. A and B were provided by Teresa L. Norris of Blume, Weyble & Norris LLC.

5. App. C can be accessed at http://www.deathpenaltyresource.org/.

6. 3 WILLIAM BLACKSTONE, COMMENTARIES *103; LARRY W. YACKLE, *Postconviction Remedies* § 4, at 7 (1981 & Supp. 1993).

Chief Justice John Marshall to be a 'great constitutional privilege.'"[7] The purpose of the writ was

> to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.[8]

South Carolina became the first American colony to adopt a statute providing for habeas corpus relief, although in its early form the remedy was available only in limited circumstances.[9] In the nineteenth century, prisoners in South Carolina could attack the jurisdiction of the court that had imposed a criminal sentence but could not otherwise challenge the validity of their convictions through habeas corpus.[10] In the late 1950s and 1960s, the use of the writ to inquire into the overall legality of a conviction was expanded in South Carolina after a series of decisions by the United States Supreme Court related to whether state procedures for addressing constitutional violations were adequate to meet the exhaustion requirement for federal habeas corpus proceedings.[11]

As early as 1949 in *Young v. Ragen*, the United States Supreme Court suggested that the states must provide prisoners with some form of "clearly defined method by which they may raise claims of denial of federal rights."[12] In stating that proposition, the Court noted: "[t]he doctrine of exhaustion of state remedies, to which this Court has required the scrupulous

7. Fay v. Noia, 372 U.S. 391, 400 (1963) (quoting *Ex parte* Bollman and Swartwout, 8 U.S. 75, 95 (1807)).

8. *Id.* at 401–02.

9. YACKLE, *supra* note 6; *see also* Blume, *supra* note 2, at 238–44 (discussing South Carolina's habeas corpus history in detail).

10. *See Ex parte* Klugh, 128 S.E. 882, 885 (S.C. 1925) ("[H]abeas Corpus calls in question only the jurisdiction of the court whose judgment is challenged.").

11. *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953); Young v. Ragen, 337 U.S. 235 (1949).

12. *Young*, 337 U.S. at 239.

adherence of all federal courts . . . presupposes that some adequate state remedy exists."[13] At the time of *Young*, and in the nearly twenty years that followed, many states employed a wide variety of common law remedies for dealing with collateral attacks on criminal convictions—remedies such as habeas corpus, *coram nobis*,[14] and motions for new trial.[15] United States Supreme Court Justice Clark felt "the great variations in the scope and availability of such remedies result[ed] in their being entirely inadequate."[16]

Shortly after *Young*, Illinois became the first state to implement a modern state post-conviction procedure when it adopted the Illinois Post-Conviction Hearing Act.[17] The Act was designed to consolidate and simplify the various common law remedies into a single process for testing the validity of criminal convictions in state court.[18] North Carolina followed suit in 1951 with a statute modeled on the Illinois Act.[19] Between 1951 and 1963, four other states passed similar legislation[20] and six other

13. *Id.* at 238–39.

14. YACKLE, *supra* note 6, at 32. The writ of *coram nobis* was essentially a post-conviction challenge to the original judgment based upon errors of fact at trial. *Id.* It was a precursor to the modern motion for new trial since both seek the remedy of a new trial. *Id.* Unlike a motion for new trial, however, *coram nobis* was not seen as a continuation of the original case. Rather, like habeas corpus, *coram nobis* was viewed as an independent civil action challenging the criminal conviction. *Id. Coram nobis* differed from habeas corpus, however, in that *coram nobis* was viewed as a collateral attack in which outside evidence could be brought in, whereas habeas corpus traditionally focused on errors that occurred on the trial record. *Id.*

15. Case v. Nebraska, 381 U.S. 336, 338 (1965) (Clark, J., concurring); *see also* Al-Shabazz v. State, 527 S.E.2d 742, 747–48 (S.C. 2000) ("Before the adoption of the [Uniform Post-Conviction Procedure Act in 1969], inmates often pursued post-appeal claims by petitioning the court for a writ of habeas corpus or other remedial writ.").

16. *Case*, 381 U.S. at 338 (Clark, J., concurring).

17. ILL. REV. STAT., ch. 38, § 122-1.

18. *Case*, 381 U.S. at 340 (Clark, J., concurring).

19. N.C. GEN. STAT. §§ 15-217 to -222 (1953 & Supp. 1963); Miller v. State, 74 S.E.2d 513, 528 (N.C. 1953).

20. Those states were Maryland, Maine, Oregon, and Wyoming. *See* MD. ANN. CODE, art. 27, §§ 645A–654J (1964); ME. REV. STAT. ANN. ch. 126, §§ 1-A to -G (1963); OR. REV. STAT. §§ 138.510–.680 (1963); WYO. STAT. ANN. §§ 7-408.1–.7 (1963).

states adopted similar procedures by rule of court.[21]

In 1965, the Supreme Court granted certiorari in *Case v. Nebraska*, "to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees."[22] The Court ultimately declined to answer this question, however, because the Nebraska state legislature passed a statute providing for such review after certiorari was granted.[23] In separate concurring opinions, Justices Clark and Brennan both encouraged the states to provide modern state post-conviction procedures to "reduce the necessity for exercise of federal habeas corpus jurisdiction."[24] Justice Brennan advised that these new state post-conviction procedures "should be swift and simple and easily invoked."[25] Moreover, they should: (a) "be sufficiently comprehensive to embrace all federal constitutional claims"; (b) "eschew rigid and technical doctrines of forfeiture, waiver, or default"; (c) "provide for full fact hearings to resolve disputed factual issues"; and (d) "provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose

21. *Case*, 381 U.S. at 338 n.3 (Clark, J., concurring) (citing ALASKA SUP. CT. R. 35(b); DEL. SUPER. CT. CRIM. R. 35; FLA. R. CRIM. 1; KY. R. CRIM. 11.42; MO. SUP. CT. R. 27.26; N.J. CRIM PRAC. R. OF SUPER. AND COUNTY CTS. 3:10A-2).

22. *Case*, 381 U.S. at 337 (Clark, J., concurring).

23. *Id.* The Court has never affirmatively answered this question. *See* Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring) (denying stay of execution) ("[T]he scope of the State's obligation to provide collateral review is shrouded in so much uncertainty . . . ."). In dicta, the Court has stated that no such right exists. *See* Pennsylvania v. Finley, 481 U.S. 551, 557–58 (1987); *but see* Young v. Ragen, 337 U.S. 235, 239 (1949) (requiring states to afford prisoners some "clearly defined method" to raise a claim when federal rights have been denied). The South Carolina Supreme Court has described the holding in *Case* as "[a] determination that the Fourteenth Amendment *may* require the states to afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." Al-Shabazz v. State, 527 S.E.2d 742, 746 (S.C. 2000) (emphasis added).

24. *Case*, 381 U.S. at 346 (Brennan, J., concurring); *Id.* at 340 (Clark, J., concurring) ("I hope that the various States will follow the lead of Illinois, Nebraska, Maryland, North Carolina, Maine, Oregon and Wyoming in providing this modern procedure . . . .").

25. *Id.* at 346–47 (Brennan, J., concurring).

the grounds of decision and the resolution of disputed facts."[26]

In the wake of *Case v. Nebraska*, the Commission on Uniform State Laws promulgated the Uniform Post-Conviction Procedure Act.[27] Its purpose was "to bring together and consolidate into one simple statute all the remedies, beyond those that are incident to the usual procedures of trial and [appellate] review, which are at present available for challenging the validity of a sentence of imprisonment."[28] South Carolina adopted its version of the Uniform Post-Conviction Procedure Act in 1969 (the PCR Act).[29] South Carolina's PCR Act was virtually identical to a revised version promulgated by the Commission on Uniform State Laws.[30] Section 17-27-20(b) states that, in general, the PCR Act "comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence."[31]

In 1995, the South Carolina legislature added a statute of limitations to the PCR Act.[32] One year later, the legislature passed the South Carolina Effective Death Penalty Act of 1996,[33] which added statutory language designed to expedite executions in South Carolina[34] and set out rules for the discovery process in PCR.[35] The 1996 amendments also addressed the transfer of files to post-conviction counsel and provided for a limited statutory waiver of the attorney-client privilege in PCR cases in which the applicant alleges ineffective assistance of prior counsel.[36] Finally, in 1999, the South Carolina legislature amended the PCR Statute to provide that the court of appeals may review a

26. *Id.* at 347.

27. UNIF. POST-CONVICTION PROCEDURE ACT, U.L.A. app. II (1966).

28. *Id.* § 1 Cmt.

29. S.C. CODE ANN. §§ 17-27-10 to -160 (2003).

30. *See* UNIF. POST-CONVICTION PROCEDURE ACT, U.L.A. app. II (1966).

31. S.C. CODE ANN. § 17-27-20(b) (2003).

32. S.C. CODE ANN. § 17-27-45 (2003). The Act adopting the statute of limitations became effective on January 12, 1995. *See* 1995 Act No. 7, Part II, § 40. The statute of limitations is discussed in detail *infra* Part IV.A.i.

33. H.R. 4469, 1995-1996 Leg., 111th Sess. (S.C. 1995-1996), *available at* http://www.scstatehouse.net/sess111_1995-1996/bills/4469.htm.

34. S.C. CODE ANN. § 17-27-160 (2003).

35. S.C. CODE ANN. § 17-27-150 (2003).

36. S.C. CODE ANN. § 17-27-130 (2003).

final judgment entered in a PCR proceeding.[37]

III. OVERVIEW OF MODERN STATE POST-CONVICTION RELIEF IN SOUTH CAROLINA

A. Nature and Purpose

The purpose of post-conviction relief in South Carolina is to provide convicted persons with a comprehensive mechanism to raise any unresolved and previously unmentioned questions of fact or law relevant to their convictions or sentences.[38] According to the South Carolina Supreme Court, the PCR Act was "designed to incorporate all rights available under federal habeas corpus."[39] It was intended to be an exclusive remedy displacing "all other common law, statutory or other remedies."[40] For the most part, PCR has replaced the various forms of common law collateral relief, but some exceptions remain.[41]

An applicant begins a PCR proceeding by submitting a claim on a standard PCR application.[42] The state attorney general's

37. *See* S.C. CODE ANN. § 17-27-100 (2003) ("[A] final judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules.") The 1999 Act No. 55, § 24 added the court of appeals to the prior language of the rule that stated "[a] final judgment entered under this chapter may be reviewed by the Supreme Court of this State on appeal brought either by the applicant or the State in accordance with laws governing appeals from the circuit court in civil cases." S.C. CODE ANN. § 17-27-100 (1997). The South Carolina Appellate Court Rules provide that final PCR decisions shall be reviewed by the supreme court upon petition of either party for a writ of certiorari, but the supreme court has discretion to transfer any such case to the court of appeals. S.C. APP. CT. R. 243. (S.C. APP. CT. R. 227 was renumbered to S.C. APP. CT. R. 243, effective April 29, 2009).

38. S.C. CODE ANN. § 17-27-20(a) (2003); *see also* YACKLE, *supra* note 6, at 3 (discussing the purpose of state habeas).

39. Finklea v. State, 255 S.E.2d 447, 447–48 (S.C. 1979); *see also* Harvey v. South Carolina, 310 F. Supp. 83, 85 (D.S.C. 1970) ("The [PCR] Act affords all the protections contemplated by our founding fathers. It is designed to afford post-conviction relief of a scope sufficiently broad to comply with the mandates and holdings of the United States Supreme Court relating to federal review of state convictions.").

40. S.C. CODE ANN. § 17-27-20(b) (2003).

41. *See infra* Part VIII.

42. S.C. CODE ANN. §§ 17-27-40, -50, and -80 (2003); S.C. R. CIV. P. 71.1; S.C. R. CIV. P. FORM 5. A copy of Form 5, current as of Nov. 14, 2009, is

office serves as counsel for the State as respondent. A PCR action is a civil action generally subject to the rules and statutes that apply in civil proceedings.[43] South Carolina Rule of Civil Procedure 71.1 instructs the parties to follow the rules of civil procedure to the extent that they are not inconsistent with the PCR Act.[44] On the other hand, the South Carolina Supreme Court has recognized that PCR proceedings are unlike other civil proceedings in that they are "rooted in a criminal case, which means important constitutional protections and criminal law concepts are regularly implicated."[45] To capture both of these concepts, PCR is sometimes referred to as a "hybrid form of action."[46]

B. Standing

Under the PCR Act, any person who has been convicted of or sentenced for the commission of a crime may institute a PCR proceeding.[47]

> The Act does not contain an express "in custody" requirement. Further, the Act does not expressly require the applicant to receive a sentence of imprisonment before bringing a PCR action.
>
> Instead, the Act allows a person who has been convicted of or sentenced for a crime to file an action. [For purposes of the PCR Act,] [c]onvict means "to prove a person guilty of a crime."

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included in App. C which can be accessed at http://www.deathpenaltyresource.org/. A fill-able version of the form, titled Application for Post-Conviction Relief, is available on the South Carolina Judicial Department's website at http://www.judicial.state.sc.us/forms/ (last viewed Nov. 14, 2009).

43. S.C. CODE ANN. § 17-27-80 (2003); Wade v. State, 559 S.E.2d 843, 846–47 (S.C. 2002).

44. S.C. R. CIV. P. 71.1.

45. Sutton v. State, 606 S.E.2d 779, 781 (S.C. 2004), *overruled on other grounds by* Bray v. State, 620 S.E.2d 743 (S.C. 2005). "PCR cases are treated differently from traditional civil cases, requiring, for example, that appellate counsel brief all arguable issues despite counsel's belief the appeal is frivolous and requiring, by statute, court-appointed counsel for an indigent applicant who is granted a hearing." *Id.* (citing *Wade*, 559 S.E.2d at 847).

46. *Sutton*, 606 S.E.2d at 781.

47. S.C. CODE ANN. § 17-27-20(a) (2003).

> A sentence is defined as "the judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted." A sentence is not limited to a term of imprisonment; instead, it may be either a term in prison or a fine or both.[48]

Thus, a person has standing to apply for PCR "if he is in custody *or* the results of his prior conviction still persist."[49] This is true even if the applicant has never been incarcerated for the underlying crime.[50] For example, in *Jackson v. State*, Kurtis Christopher Jackson was convicted of possession of marijuana and ordered to pay a fine or serve thirty days in jail.[51] Jackson chose to pay the fine and was never incarcerated for the crime.[52] In his post-conviction relief application, Jackson alleged his conviction was invalid and that he continued to suffer a number of adverse consequences from the conviction, including: (1) he was denied Section 8 housing;[53] (2) the conviction could be used against him in a custody action; (3) the conviction could be used to enhance the sentence of a future drug conviction; (4) Jackson's license was suspended as a result of the conviction without prior notice; and (5) because he did not know of the suspension, Jackson was later charged with driving under a suspended license.[54] The South Carolina Supreme Court held that Jackson was entitled to proceed with his PCR application if the lower court determined that he was suffering continuing consequences as a result of his alleged invalid conviction.[55] Similarly, a PCR applicant has standing if the applicant alleges continuing consequences even though the sentence has already been fully

48. *Id.* (internal citations omitted).

49. *Id.* (internal quotation marks omitted).

50. *Id.*

51. *Id.*

52. *Id.*

53. The Section 8 program is a federal housing subsidy program administered by the United States Department of Housing and Urban Development. 24 C.F.R. § 882 (2001). The purpose of the program is to assist low income people in obtaining safe and clean rental accommodations and to promote "economically mixed housing." 42 U.S.C. § 1437f(a) (2006); 24 C.F.R. § 882.101 (2001).

54. *Jackson*, 489 S.E.2d at 916 n.1.

55. *Id.* at 916.

served.[56]

C. Post-Conviction v. Direct Appeal

PCR claims must be couched in appropriate procedural terms—meaning a PCR applicant may not raise claims that were or could have been raised on direct appeal, nor may a criminal defendant raise a PCR claim on direct review. A PCR applicant may not bring a PCR action while a direct appeal is pending.[57] "In a direct appeal, the focus is generally upon the propriety of rulings made by the circuit court in response to a party's motions or objections."[58] In PCR, the focus is usually on alleged errors made by prior counsel and other errors of law or fact that occurred outside the record below.[59] The South Carolina Supreme Court said that "when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the [PCR] applicant generally must frame the issue as one of ineffective assistance of counsel."[60] This assertion is both overbroad and underinclusive—not all errors appropriate for PCR constitute ineffective assistance of counsel, nor must they be stated as such to be viable PCR claims—but it is correct that post-conviction relief is not a substitute for direct appeal.[61] In other words, "errors which could have been reviewed on appeal may not be asserted for the first time, or reasserted in post-conviction proceedings"[62]—at least not in exactly the same way these errors were or could have been asserted on direct appeal.

Some examples will help clarify this point. South Carolina ascribes to a set of particularly onerous procedural default rules.[63] In particular, South Carolina requires strict adherence

56. McDuffie v. State, 277 S.E.2d 595, 596 (S.C. 1981).
57. S.C. R. CIV. P. 71.1(b).
58. Al-Shabazz v. State, 527 S.E.2d 742, 747 (S.C. 2000).
59. *Id.*
60. *Id.*
61. Cummings v. State, 260 S.E.2d 187, 188 (S.C. 1979).
62. *Id.*
63. *See* John H. Blume & Emily C. Paavola, *"I Object" is Not Enough: Tips for Criminal Defense Attorneys on Avoiding Procedural Default*, SOUTH

to the "contemporaneous objection" rule.[64] In *State v. Holmes*,[65] a capital case, defense counsel objected to the solicitor's closing argument in which the solicitor took advantage of the trial judge's erroneous decision to exclude evidence that another man had actually committed the crime by repeatedly arguing that if Holmes had not committed the crime, "where is this raping, murdering, beating fellow that actually did this thing?"[66] After the solicitor had concluded his argument, defense counsel objected to these statements and moved for a mistrial.[67] On direct appeal, however, the South Carolina Supreme Court held defense counsel's objection was procedurally barred because, although defense counsel did bring the issue to the trial court's attention, he did not do so "contemporaneously" with the solicitor's statements.[68] Because these claims could have been reviewed on direct appeal if they had been properly preserved, Holmes is unable to raise them in the same manner in post-conviction. Instead, in his PCR application, Holmes must allege that his trial attorney provided ineffective assistance by unreasonably failing to preserve the issues for direct review and that this failure prejudiced the outcome of the case.[69]

In another capital case, *State v. Stone*,[70] trial counsel objected when the victim's widow testified during Stone's second

CAROLINA LAW., Jan. 2009, at 35; John H. Blume & Pamela A. Wilkins, *Death By Default: State Procedural Default Doctrine In Capital Cases*, 50 S.C. L. REV. 1 (1998) (discussing South Carolina's procedural default jurisprudence in detail).

64. *See, e.g.*, State v. Vazquez, 613 S.E.2d 359 (S.C. 2005).

65. 605 S.E.2d 19 (S.C. 2004), *rev'd on other grounds*, 547 U.S. 319 (2006).

66. *See* Transcript of Record on Appeal at 4220, *Holmes*, 605 S.E.2d 19 (No. 25886). The solicitor made similar arguments throughout his closing statement. *Id.* at 4210, 4212, 4216, 4223, 4228, 4231, 4263.

67. *Id.* at 4236–67.

68. *Holmes*, 605 S.E.2d at 25.

69. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) (holding that to establish a claim of ineffective assistance of counsel, a PCR applicant must meet a two-prong test by showing: (1) that counsel's performance was deficient – i.e., it fell below an objective standard of reasonableness, and (2) that counsel's error was prejudicial, meaning that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different).

70. 655 S.E.2d 487 (S.C. 2007).

sentencing proceeding that she attempted suicide after learning the South Carolina Supreme Court had reversed Stone's first death sentence.[71] In support of his objection, trial counsel argued the cause of the suicide attempt was not the victim's murder seven years earlier, but rather the financial pressures that the victim's widow and her new husband were experiencing at the time.[72] Counsel also argued that "the fact that she was able to testify about this attempted suicide was extremely prejudicial to the defendant and that testimony should have been excluded."[73]

On appeal, Stone argued the widow's testimony improperly invited the jury to speculate about the finality of its decision and to consider how its decision might affect the health of the victim's widow.[74] The South Carolina Supreme Court found this argument was different from the argument raised at trial, and thus, it was not preserved for review: "while Appellant's argument below focused on what caused the victim's widow to attempt suicide—meaning, what caused the testimony to be relevant—Appellant's argument on appeal abandons the issue of relevance and addresses only the effect this testimony may have had on the jury."[75] The court further found that because Stone "abandoned" the argument he raised at trial, he waived that argument as well.[76]

If Stone seeks to raise this issue in PCR based on the arguments that appellate counsel tried to raise, he will have to show his trial counsel was ineffective for failing to properly preserve the arguments concerning the effect the testimony could

71. *Id.* at 488.

72. *Id.*

73. Trial Transcript at 1106, *Stone*, 655 S.E.2d 487 (No. 26408).

74. *Stone*, 655 S.E.2d at 488.

75. *Id.*

76. *Id.* at 489. The merits of South Carolina's draconian procedural default rules are thoroughly discussed and critiqued elsewhere. *See* Blume & Wilkins, *supra* note 63 (critiquing South Carolina's modern procedural default rules); *see also* Blume & Paavola, *supra* note 63, at 35–39 (discussing practical concerns for properly preserving trial objections for appellate review); Robert Dudek, The Honorable Ralph King Anderson Jr.'s Series on Effective Appellate Practice: Preserving the Record (2006), http://www.scbar.org/member_resources/continuing_legal_education/distance_learning (discussing practical concerns for properly preserving trial objections for appellate review).

have had on the jury. Stone's claim that his trial counsel was ineffective could not have been raised on direct appeal, because it is not an error that was raised and ruled upon by the trial court.[77] On the other hand, if Stone seeks to raise the relevance argument that trial counsel *did* preserve (on its own or in addition to the arguments that appellate counsel raised), then his PCR application must allege appellate counsel was ineffective for "abandoning" the relevance argument.

D. Cognizable Claims

Claims raised in post-conviction must not only be framed in appropriate terms, depending on the procedural posture as explained above, but they must also be otherwise cognizable under the PCR Act. A PCR applicant can raise almost any allegation relevant to any phase of the previous court proceedings. Specifically, an applicant can raise virtually every alleged denial of a federal constitutional right, with the exception of sufficiency of the evidence.[78] The PCR Act also recognizes almost any abridgment of a state created right.[79] Specifically, the statute permits the following six categories of claims: (1) the conviction or sentence was in violation of the Constitution of the United States, the South Carolina constitution, or South Carolina state law; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the maximum authorized by law; (4) there is evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; (5) the sentence has expired; probation, parole or conditional release has been unlawfully revoked; or that the applicant is otherwise unlawfully held in custody or other restraint; and (6) the conviction or

77. *See* State v. Kornahrens, 350 S.E.2d 180, 184 (S.C. 1986) (stating that a claim of ineffective representation at the trial level is not reviewable on direct appeal but rather may only be asserted in proceedings under the PCR Act).

78. S.C. CODE ANN. § 17-27-20(a)(6) (2003) ("[T]his section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."); *but cf.* Jackson v. Virginia, 443 U.S. 307, 313–16 (1979) (holding that insufficiency of the evidence is a federal constitutional claim).

79. § 17-27-20(a)(1).

sentence is otherwise subject to collateral attack upon any ground of alleged error previously available under any common law, statutory or other writ, motion, petition, proceeding or remedy.[80]

In 2000, the South Carolina Supreme Court held in *Al-Shabazz v. State*,[81] that issues related to sentencing credits and other conditions of imprisonment are not cognizable claims under the PCR Act.[82] Al-Shabazz filed a PCR application challenging the Department of Corrections Adjustment Committee's decision to take away a portion of the credits he earned for good conduct.[83] He alleged the Committee had unlawfully found him guilty of violating institutional rules, illegally placed him in solitary confinement, and violated his constitutional rights when it withdrew good-time credits from his eighty-three year sentence.[84] The PCR court summarily dismissed the case,[85] relying on *Tutt v. State*,[86] in which the court held the PCR Act does not authorize an allegation that an inmate's constitutional rights were violated when prison authorities transferred him within the prison system and downgraded his custody status.[87] After *Tutt*, however, the court allowed inmates to raise claims regarding sentence-related credits in PCR proceedings "because calculating those credits potentially affects the duration of a sentence."[88]

80. §§ 17-27-20(a)(1)–(6).
81. 527 S.E.2d 742 (S.C. 2000).
82. *Id.* at 749.
83. *Id.* at 746.
84. *Id.*
85. *Id.*
86. 290 S.E.2d 414 (S.C. 1982).
87. *Id.* at 415.
88. *Al-Shabazz*, 527 S.E.2d at 748; *see* Busby v. Moore, 498 S.E.2d 883, 884 (S.C. 1998) (deciding in PCR actions that inmates are eligible to earn good-time credits when their sentence begins to run, but inmates actually earn the credits only after they behave properly); Harris v. State, 424 S.E.2d 509, 511 (S.C. 1992) (deciding in PCR action that Ex Post Facto Clause was not violated because inmate was not prejudiced by inability to earn good-time and work credits); Elmore v. State, 409 S.E.2d 397, 400 (S.C. 1991) (deciding in PCR action that substantive violation of Ex Post Facto Clause results from denial of work credits to inmates entitled to such credits when an offense is committed, but inmate suffered no ex post facto violation because he was not eligible for the credits when he committed his crime).

Further, despite its decision in *Tutt*, the court had occasionally allowed inmates to raise conditions of imprisonment in a PCR proceeding.[89]

In 1995, the legislature enacted a statute of limitations for PCR actions, which requires that an application be filed "within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later."[90] The statute also sets a one-year deadline for filing an application to assert a newly created and retroactively applied standard or right, and a one-year deadline to raise newly discovered material facts that require vacation of a conviction or sentence.[91] Under the new statute of limitations, "an inmate whose credits-related claim arises years after the deadline is barred from filing a PCR application."[92]

Thus, partly to address confusion caused by the courts' cases over the years and partly to address "the impact of the new statute of limitations," the court granted certiorari in *Al-Shabazz* in order to "re-emphasize the core purpose of the PCR Act as set forth in S.C. Code Ann. § 17-27-20(a)."[93] The court held that, in general, "PCR is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence.*"[94] The only exceptions to this general rule are the two non-collateral matters specifically listed in the PCR Act: (1) the claim that an applicant's sentence has expired; and (2) the claim that an applicant's probation, parole, or conditional release has been unlawfully revoked.[95] These two claims do not fit under the court's general approach because they do not challenge the validity of the underlying conviction or sentence. Yet, because they are specifically listed in the PCR

89. *See* Simmons v. State, 446 S.E.2d 436, 437 (S.C. 1994) ("[C]onditions of imprisonment have been considered on a discretionary basis in PCR proceedings and by this Court.").

90. S.C. CODE ANN. § 17-27-45(A) (2003).

91. *Id.* § 17-27-45(B).

92. *Al-Shabazz*, 527 S.E.2d at 748–49.

93. *Id.* at 749.

94. *Id.*

95. *Id.*

Act, they may be raised in PCR as non-collateral matters.[96] Aside from these two exceptions, all other PCR claims must attack the validity of the underlying conviction or sentence.[97] The court held that claims regarding sentence-related credits or other conditions of imprisonment do not fall into this category and are therefore not cognizable under the PCR Act.[98]

The court's decision in *Al-Shabazz* substantially changed the process by which inmates may raise claims regarding prison conditions and time credits. Now, inmates must seek review of these issues in an administrative proceeding under the Administrative Procedures Act.[99] Since *Al-Shabazz*, the court has revisited issues of prison conditions and credits-related issues several times to clarify that the PCR Act permits a claim that an inmate has been unlawfully returned to prison,[100] and it permits a claim that a sentence has expired because of actual time served in another jurisdiction.[101] But, the PCR Act does not permit a claim that the Department of Corrections miscalculated a sentence's start date due to a clerical error,[102] nor does it recognize a claim that an inmate's parole revocation attorney rendered ineffective assistance of counsel.[103]

IV. PRE-HEARING PROCEDURE

A. Preparing the Application

i. Statute of Limitations

Under the PCR Act, an applicant must initiate a PCR proceeding within one year after one of three enumerated events,

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 750. This article does not discuss the procedures for this type of review. The Administrative Procedures Act is set forth in S.C. CODE ANN. §§ 1-23-10 to -60 (1976), S.C. CODE ANN. §§ 1-23-310 to -410 (1976), and S.C. CODE ANN. §§ 1-23-500 to -600 (1976).

100. Kerr v. State, 547 S.E.2d 494, 497 (S.C. 2001).

101. Delahoussaye v. State, 633 S.E.2d 158, 160–61 (S.C. 2006).

102. Cooper v. State, 525 S.E.2d 886, 888 (S.C. 2000).

103. Duckson v. State, 586 S.E.2d 576, 577–78 (S.C. 2003).

whichever is later: (1) the entry of a judgment of conviction; (2) the sending of the remittitur to the lower court from an appeal; or (3) the final decision upon an appeal.[104] For example, assume a criminal defendant is convicted of murder, sentenced to death, and judgment is entered on January 1, 2009. The defendant appeals to the South Carolina Supreme Court. His appeal is denied on June 1, 2009; he moves for a rehearing and that motion is denied on June 10, 2009. Then, the defendant seeks a writ of certiorari from the United States Supreme Court. His petition for certiorari is denied on January 1, 2010. The defendant must begin a PCR action by January 1, 2011, because the final disposition upon appeal occurred in his case on January 1, 2010.

If, however, the defendant had opted not to, or was unable to file a petition for certiorari in the United States Supreme Court, he should consider the statute of limitations for a PCR action as running one year from June 10, 2009—treating final disposition as occurring upon denial of his motion for rehearing before the South Carolina Supreme Court.[105] If the defendant had chosen not to file an appeal at all, he should commence a PCR action by January 1, 2010, because entry of the judgment of conviction occurred on January 1, 2009.

There are two exceptions to the general one-year statute of limitations. First, when the South Carolina Supreme Court or a court whose decisions are binding upon the South Carolina Supreme Court announces a new substantive standard or right

104. S.C. CODE ANN. § 17-27-45(A) (2003).

105. This suggestion is based on the most conservative reading of the statutory language. To our knowledge, there is no South Carolina case law explaining when a decision upon an appeal becomes "final." For purposes of federal habeas corpus review, a judgment is not considered "final" until the conclusion of direct review (including certiorari proceedings) *or* the expiration of the time for seeking such review—meaning, where a defendant does not seek certiorari, for whatever reason, the judgment against him is not considered final until the time period in which he *could have* filed a petition for certiorari has expired. But, because there is no South Carolina authority expressly adopting this approach for state post-conviction, we prefer to err on the safe side and recommend that applicants who do not seek certiorari treat their appeals as "final" upon denial of rehearing (or upon denial of direct appeal if no rehearing is sought).

that is intended to be applied retroactively,[106] a PCR applicant has one year from the date on which the new standard or right was determined to commence a PCR application.[107] This rule applies even if the general statute of limitations has already expired.[108] Thus, in the first example above, assume the defendant was required to commence a PCR proceeding by January 1, 2011 but failed to do so. Under normal circumstances, this defendant's PCR application is untimely because the statute of limitations has expired. If, however, the United States Supreme Court announces a new substantive standard or right that applies to this defendant on June 1, 2011, and if that new rule is intended to be applied retroactively, the defendant may nonetheless commence a PCR proceeding as long as he does so within one year after the Court's decision announcing the new rule.

Second, if a PCR applicant has newly discovered evidence,

106. South Carolina courts are required to follow the United States Supreme Court decisions on retroactivity. *See, e.g.*, Danforth v. Minnesota, 522 U.S. ___, 128 S. Ct. 1029, 1035 (2008); Talley v. State, 640 S.E.2d 878, 880–81 (S.C. 2007). In general, a new procedural rule will not be applied retroactively unless the new rule falls within one of two exceptions: (1) it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;" or (2) it "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." Teague v. Lane, 489 U.S. 288, 307 (1989) (internal quotation marks omitted) (internal citation omitted). Examples of decisions falling within the first exception include *Atkins v. Virginia*, 536 U.S. 304 (2002) (excluding mentally retarded offenders from the death penalty), and *Roper v. Simmons*, 543 U.S. 551 (2005) (barring the death penalty for juvenile offenders). The second exception is "reserved for watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the proceeding. *Teague*, 489 U.S. at 311. The Supreme Court has repeatedly cited *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example of the watershed exception. *Id.* (holding that the Sixth Amendment right to assistance of counsel for all criminally accused is made obligatory on the states by the Fourteenth Amendment).

107. S.C. CODE ANN. § 17-27-45(B) (2003); *see also Talley*, 640 S.E.2d at 882 (determining that the limitations period set forth in section 17-27-45(B) applied in Talley's post-conviction relief application because the application was filed within one year of *Alabama v. Sheton*, 535 U.S. 654 (2002), which announced a watershed rule of criminal procedure that applies retroactively).

108. *See* Franklin v. Maynard, 588 S.E.2d 604, 606 n.7 (S.C. 2003) (citing S.C. CODE ANN. § 17-27-45(B)) (an applicant is not barred from raising mental retardation in a second PCR application).

she may benefit from a more lenient statute of limitations. Specifically,

> [i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.[109]

This exception is commonly known as "the discovery rule." In *Coats v. State*,[110] PCR applicant Roger Coats alleged his trial attorney was ineffective for improperly advising him that he would be eligible for parole if he pled guilty to conspiracy to trafficking marijuana.[111] Coats ultimately pled guilty, and he was sentenced to seven years imprisonment.[112] Coats did not pursue a direct appeal.[113] After the one-year statute of limitations had expired, Coats learned he was not eligible for parole.[114] The lower court denied the defendant's PCR application.[115] The South Carolina Supreme Court reversed, holding that Coats's claim fell within the "discovery rule."[116] The court observed that Coats's understanding of "his parole eligibility may have affected the validity of the underlying plea."[117] Because Coats filed his claim within one year after discovering his trial attorney's error, his petition was timely and he was entitled to an evidentiary hearing to determine if his trial counsel was in fact ineffective.[118]

Aside from the two statutory exceptions, there may certainly be situations in which the statute of limitations may be equitably

109. S.C. CODE ANN. § 17-27-45(C) (2003).
110. 575 S.E.2d 557 (S.C. 2003).
111. *Id.* at 558.
112. *Id.* at 557.
113. *Id.*
114. *Id.*
115. *Id.* at 558.
116. *Id.*
117. *Id.*
118. *Id.* at 559.

tolled. The South Carolina Supreme Court recently held, as a matter of first impression, that if an applicant demonstrates his mental incompetence prevented a timely filing, then tolling of the PCR limitation period is warranted.[119] The court has, however, held that the statute of limitations is not equitably tolled in other particular situations: (1) where an applicant is unaware of the statute of limitations while he is incarcerated in another jurisdiction;[120] (2) while an applicant seeks federal habeas relief prior to exhausting his state remedies;[121] and (3) when a PCR action is dismissed without prejudice, but the statute of limitations runs before the applicant refiles.[122]

There is one last caveat to add to this discussion on the statute of limitations, which is that the general one-year period does not apply where a defendant is denied direct appeal due to ineffective assistance of counsel.[123] This is not so much an exception to the statute of limitations, but rather a special situation in which the statute of limitations does not apply. In *Wilson v. State*,[124] Wilson was tried and convicted of armed robbery and sentenced to thirty years confinement in the department of corrections on October 18, 1995.[125] Wilson did not

119. Ferguson v. State, 677 S.E.2d 600 (S.C. 2009).

120. Leamon v. State, 611 S.E.2d 494, 496 (S.C. 2005)

> We conclude incarceration in another state does not toll the running of the statute of limitations. Petitioner had a full year to submit a post-conviction petition. Ignorance of the statute of limitations is not an excuse for late filing, even when the Petitioner claims he did not learn of the statute because he was incarcerated in another state.

Id.

121. Green v. State, 576 S.E.2d 182, 183 (S.C. 2003).

122. Norris v. State, 515 S.E.2d 523, 524–25 (S.C. 1999). "However, a defendant is estopped from claiming that defense of statute of limitations when the defendant consents to plaintiff's motion for voluntary dismissal without prejudice, and the statute has run prior to the granting of the dismissal." *Id.* at 525 (citing Mende v. Conway Hosp., Inc., 404 S.E.2d 33 (S.C. 1991)). Similarly, where the State consents to the dismissal of a PCR application after the statute has run and agrees the petitioner should be allowed to re-file an application, the State is estopped from asserting the statute of limitations as a defense to a subsequent PCR application. *Id.* at 525.

123. Odom v. State, 523 S.E.2d 753, 756 (S.C. 1999).

124. 559 S.E.2d 581 (S.C. 2002).

125. *Id.* at 582.

have direct appeal review.[126] Rather, he claimed he instructed his trial attorney to appeal his conviction, but the trial attorney failed to do so.[127] Nearly two years later, on September 30, 1997, Wilson filed an application for PCR alleging his trial attorney was ineffective in several respects.[128] The lower court dismissed Wilson's petition as untimely.[129] On appeal, the South Carolina Supreme Court reversed, holding the statute of limitations does not apply when an applicant alleges he did not knowingly and intelligently waive his right to a direct appeal from his criminal conviction.[130] The court explained:

> A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal and one PCR application. In this case, Wilson has not had "one bite of the apple" since he has not received either a direct appeal from his conviction or a PCR hearing.
>
> [The "one fair bite"] policy would be frustrated if the one year statute of limitations for PCR claims applied where the applicant was denied his direct appeal due to ineffective assistance of counsel, and then was denied his right to a PCR application because of the one year statute of limitations.[131]

Finally, PCR applicants should be mindful of the statute of limitations for federal habeas corpus review, which is calculated by a slightly different standard. Pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), as amended in 1996, a one-year period of limitation applies to an application for "a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."[132] The limitation period begins to run from the latest of four possible dates:

> (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 582–83.
131. *Id.* (citations omitted).
132. 28 U.S.C. § 2244(d)(1) (2000).

seeking such review;[133]

> (2) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (3) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.[134]

The one-year federal limitations period is tolled for "the time during which a properly filed application for [s]tate post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."[135]

> [T]he entire period of state post-conviction proceedings, from initial filing to final disposition by the highest state court (whether a decision on the merits, denial of certiorari, or expiration of the period of time to seek further appellate review) is tolled from the limitations period for federal habeas corpus petitioners.[136]

ii. Jurisdiction and Venue

A PCR application must "be heard in, and before any judge of, a court of competent jurisdiction in the county in which the conviction took place."[137] The South Carolina Supreme Court has

133. *See supra* note 105 (explaining the calculation for this event in greater detail).

134. 28 U.S.C. § 2244(d)(1)(A-D).

135. § 2244(d)(2).

136. *See* Taylor v. Lee, 186 F.3d 557, 561 (4th Cir. 1999).

137. S.C. CODE ANN. § 17-27-80 (2003); *see also* S.C. CODE ANN. § 17-27-30 (2003) ("The court in which, by the Constitution and statutes of this State, original jurisdiction in habeas corpus is vested . . . .").

held that the phrase "in the county in which the conviction took place" refers to the judge's jurisdiction in the county and not the location of the PCR hearing itself.[138] Thus, the PCR Act is not violated, for example, when an applicant's petition is filed in York County where he was convicted, but the PCR hearing takes place in Union County by a presiding judge with jurisdiction over both counties.[139] Moreover, although the PCR Act says that "any judge" of competent jurisdiction may preside over a PCR proceeding, that is not entirely true. In all post-conviction proceedings, a judge must recuse himself if he was also the judge who presided over the guilty plea, criminal trial, or probation revocation proceeding for which post-conviction relief is being sought, *if* the PCR applicant moves for recusal.[140] This is a per se rule of recusal—it is not open to the trial judge's discretion provided the applicant requests it by motion.[141] In capital cases, the PCR judge must not be the original sentencing judge.[142] A member of the South Carolina Supreme Court (usually the chief justice) assigns a post-conviction relief judge to maintain exclusive jurisdiction over the application in capital PCR proceedings.[143]

iii. Form and Contents of the Application

A PCR proceeding is commenced by filing a verified application.[144] The application must be filed with the clerk of the court in which the underlying conviction took place.[145] An applicant must verify facts within her personal knowledge as well as the authenticity of any documents or exhibits attached to the application.[146] The South Carolina Supreme Court prescribes a form, designated "Form 5" to the South Carolina Rules of Civil

138. Buchanan v. State, 276 S.E.2d 302, 303–04 (S.C. 1981).
139. *Id.*
140. Floyd v. State, 400 S.E.2d 145, 146 (S.C. 1991).
141. *Id.*
142. S.C. CODE ANN. § 17-27-160(A) (2003).
143. *Id.*
144. S.C. CODE ANN. § 17-27-40 (2003).
145. *Id.*
146. *Id.*

Procedure, on which to make the initial application.[147] In accordance with the PCR Act, the form instructs the applicant to: (1) identify the proceedings in which the applicant was convicted; (2) give the date of the entry of the judgment and sentence complained of; (3) specifically set forth the grounds upon which the application is based, and clearly state the relief desired; and, (4) identify all previous proceedings taken by the applicant to secure relief from his conviction or sentence, and identify the grounds asserted in all previous proceedings.[148] Form 5 also instructs applicants to "state concisely . . . the facts which support each of the grounds" on which the applicant bases her allegations for relief.[149] Arguments, citations and discussion of legal authorities, however, are not necessary.[150]

iv. Fees

The PCR Act specifically states an action for post-conviction relief may be instituted without the payment of a filing fee,[151] regardless of the applicant's financial status.[152] Other types of civil inmate litigation do require payment of a filing fee through quarterly deductions from the inmates' department of corrections trust accounts.[153] In such instances, the prisoner must file a certified copy of his trust account with the court showing the account balance.[154] In the case of PCR, however, there is no filing fee required by law, and the more general rules concerning civil inmate litigation do not apply.[155] Moreover, an indigent

147. S.C. R. CIV. P. FORM 5. A copy of this form, current as of Nov. 14, 2009, is included in App. C which can be accessed at http://www.deathpenaltyresource.org/. A fill-able version of the form, titled Application for Post-Conviction Relief, is available on the South Carolina Judicial Department's website at http://www.judicial.state.sc.us/forms/ (last visited Nov. 14, 2009).

148. *Id.*; *see also* S.C. CODE ANN. § 17-27-50 (2003).

149. S.C. R. CIV. P. FORM 5.

150. S.C. CODE ANN. § 17-27-50 (2003).

151. S.C. CODE ANN. § 17-27-20(a)(6) (2003).

152. Thompson v. State, 479 S.E.2d 808, 808 (S.C. 1997).

153. H.B. 4472, 1996 Leg., Act 455 § 1 (S.C. 1996) (codified as amended at S.C. CODE ANN. § 24-27-100 (2003)).

154. *Id.*

155. *Thompson*, 479 S.E.2d at 808.

PCR applicant is entitled to a free copy of his trial transcript upon a showing of need.[156] In practical terms, a PCR applicant or his post-conviction counsel can usually obtain a copy of the trial transcript from appellate counsel, assuming the applicant has had appellate review.

B. Procedure upon Court's Receipt of Application

i. The State's response

Upon receipt of the application, the court clerk will docket the application, bring it to the attention of the court, and deliver copies to the attorney general and the solicitor of the circuit in which the applicant was convicted.[157] The State, as respondent, is required to answer the allegations within thirty days, or within such time as the court may allow.[158] However, if the State fails to respond within the specified period, the applicant must conclusively show he was prejudiced by the State's delay in order to receive the relief requested in the application.[159] The State may respond by answer (usually called a "return") or by motion which may be supported by affidavits.[160] If the State responds by motion, it will generally be construed as either: (1) a motion to dismiss (in which the State claims that the application should be dismissed because it is successive, barred by the statute of limitations, otherwise improperly filed, or fails to allege facts that, assuming they are true, are sufficient to constitute a legal cause of action);[161] or, (2) a motion for summary judgment (in which the State alleges there is no genuine issue of material fact

156. Gunter v. State, 229 S.E.2d 723, 724 (S.C. 1976).

157. S.C. CODE ANN. § 17-27-40 (2003).

158. S.C. CODE ANN. § 17-27-70(a) (2003).

159. Kneece v. State, 236 S.E.2d 746, 747 (S.C. 1977) (per curiam) (citing Herring v. State, 206 S.E.2d 885 (S.C. 1974) (per curiam)); *see also* Slezak v. South Carolina, No. 2003-CP-10-766, 2003 WL 25459562, at *8 (S.C. Com. Pl. Nov. 24, 2003) (citing *Kneece* with approval).

160. S.C. CODE ANN. § 17-27-70(a) (2003).

161. S.C. R. CIV. P. 12(b). In considering the PCR application, however, the court must "take account of substance, regardless of defects of form." S.C. CODE ANN. § 17-27-70(a) (2003).

and the State is entitled to judgment as a matter of law).[162] It is not uncommon for the State to file a return to the application and simultaneously file a motion for summary judgment.

ii. Determining Whether a Hearing is Required and Appointment of Counsel

In capital cases, if the applicant is indigent and desires to be represented by counsel, the court must appoint two attorneys to represent the applicant.[163] In non-capital cases, counsel will be appointed for indigent applicants *only* if a hearing is held.[164] If the inmate cannot afford to hire an attorney to prepare the application, as nearly all cannot, she must prepare the application herself. Under the PCR Act, counsel will not be appointed to represent an indigent inmate until *after* the application has been filed. Even then, counsel will not be appointed unless the application properly alleges one or more grounds that will require a hearing.[165] Historically, it has been up to the PCR judge to review the application, determine whether or not it alleged sufficient grounds to require a hearing, and then grant or deny appointment of counsel accordingly. This process was inadequate to protect an inmate's right to meaningful post-conviction review, because the hinge on which the court's decision turned—the application—is left entirely to the inmate alone.

Recently, however, the chief justice of the South Carolina Supreme Court issued an administrative order in which she opined that even this procedure resulted in *too many* appointments of counsel in PCR cases.[166] On October 6, 2008,

162. S.C. R. CIV. P. 56. If a party moves to dismiss, but presents matters outside the pleadings (and those matters are not excluded by the court) the motion will be treated as one for summary judgment rather than a motion to dismiss. *See* S.C. R. CIV. P. 12(c).

163. S.C. CODE ANN. § 17-27-160(B) (2003).

164. S.C. R. CIV. P. 71.1(d) ("If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent.").

165. *Id.*

166. *See* Order Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court, (Oct. 6, 2008) [hereinafter Order Appointment], http:

Chief Justice Toal directed that instead of the PCR judge, the attorney general's office—the respondent—will now decide whether or not a PCR applicant is entitled to counsel. Under the new procedure, the attorney general's office files a return to the inmate's application in which "the [a]ttorney [g]eneral's [o]ffice shall clearly state in the caption heading whether it requests that counsel be appointed for the applicant."[167] If the attorney general, *who is the inmate's adversary*, requests that counsel not be appointed and asserts that the application is barred as being successive or as being untimely under the statute of limitations, only the chief judge for administrative purposes in that circuit may override the request by written order.[168] If the attorney general does not recommend the appointment of counsel for any other reason, counsel will not be appointed without a written order of a circuit court judge.[169] Without counsel, however, it is unclear how any prisoner is expected to obtain a written order overriding the attorney general's request, and no procedure for obtaining such review is set forth in Chief Justice Toal's directive.

Although the impetus for Chief Justice Toal's administrative order—the conservation of judicial resources—is a valid concern, the solution tramples the rights of inmates and exacerbates an already ineffective mechanism for the appointment of counsel in PCR cases.[170] The new procedure creates an inherent conflict of interest by placing power over the appointment of counsel in the hands of the attorney general—whose role as an advocate for the State is to support the underlying conviction—rather than in the

//www.judicial.state.sc.us/whatsnew/disp layWhatsNew.cfm?indexId=477.

167. *Id.*

168. *Id.*

169. *Id.*

170. It is far from clear whether Chief Justice Toal, or any other justice, has the authority to issue such an order. It is unclear whether a single justice of the court may delegate what is essentially a judicial function by reassigning that function to the executive branch, of which the state attorney general is a member. Moreover, although the court as a whole has authority to make certain kinds of rules, such as rules of procedure, all court members as well as the public generally participate in that process. It is far more questionable for a single member of the court to issue a broad-sweeping rule without any prior notice or participation by the public.

hands of a neutral arbitrator. Moreover, the very nature of the order, which was designed to prevent "an unnecessary burden"[171] on appointed counsel and courts, biases an already-biased decision-maker against the appointment of counsel. Without counsel, many applicants cannot possibly know whether their claims have merit, whether they have a claim requiring a hearing, or whether the attorney general's recommendation as to counsel is properly grounded in fact and law. Denying counsel to assist applicants with this process and assigning that task to their adversary instead is hardly a good solution. A better method for screening PCR cases would be to provide in-house lawyers in prisons to help potential applicants wade through their claims and prepare their applications. These lawyers could help reduce frivolous PCR applications by helping inmates discern between meritorious claims and those that are time-barred, successive, or otherwise without merit.

iii. Discovery

Except in capital cases in which the applicant is automatically entitled to discovery, PCR applicants are only allowed to invoke the processes of discovery if, and to the extent that, a judge grants them leave to do so.[172] The court has discretion to permit discovery for good cause shown but is not required to grant discovery in any non-capital case.[173] An applicant desiring to engage in formal discovery should file a motion for leave to obtain discovery, explaining why she has good cause to invoke discovery. The motion should indicate what discovery is requested and why it is needed.[174] A non-capital PCR applicant is not assigned a PCR judge until her case is scheduled for hearing by the attorney general assigned to the case. In order to obtain a ruling on the discovery motion in advance of the hearing, it is recommended that non-capital applicants employ one of two methods: (1) file the motion for

171. *See* Order Appointment, *supra* note 166.

172. S.C. CODE ANN. § 17-27-150 (2003).

173. *Id.*

174. A sample motion requesting discovery is included in App. C which can be accessed at http://www.deathpenaltyresource.org/.

leave to obtain discovery before the chief administrative common pleas judge in the circuit in which the conviction occurred and request a hearing on the motion from that judge; or (2) file the motion in the appropriate circuit and then request that the motion be scheduled for hearing at the next upcoming PCR term—by either contacting the attorney general assigned to that term, or if necessary, by making the request to the judge assigned to the next PCR term.

Once authorized, the rules of discovery applicable in other civil cases also apply in PCR proceedings.[175] The rules allow for use of interrogatories, requests to produce documents, requests for admission, and other discovery mechanisms. The PCR Act provides for the appointment of counsel to indigent defendants "[i]f necessary for the effective utilization of discovery procedures."[176]

Even in cases in which the court refuses to grant discovery, applicants may obtain some of the information they need through state and federal Freedom of Information Act laws (FOIA). The South Carolina Freedom of Information Act is codified at sections 30-4-10 to -165 in the South Carolina Code.[177] Upon request, FOIA mandates disclosure of records held by a "public body" unless the documents fall within enumerated exemptions.[178] "South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government."[179] In enacting FOIA, the South Carolina legislature expressly provided that disclosure is the dominant objective of the act:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and

175. S.C. CODE ANN. § 17-27-150(B) (2003).
176. S.C. CODE ANN. § 17-27-150(A) (2003).
177. *See* S.C. CODE ANN. §§ 30-4-10 to -165 (2003).
178. *See* S.C. CODE ANN. §§ 30-4-30 to -40 (2003).
179. Fowler v. Beasley, 472 S.E.2d 630, 633 (S.C. 1996).

> report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.[180]

Thus, FOIA creates an affirmative duty on the part of public bodies to disclose information to any member of the public who requests it.[181]

The key operative provision of FOIA provides: "Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access."[182] A "public body" includes, among other things, any department of the state, any state board, commission, agency, or authority, any public or government body, political subdivision of the state, or any organization, corporation or agency supported in whole or in part by public funds or expending public funds.[183] A "public record" is defined broadly to include "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body."[184] Thus, in general, PCR applicants may use FOIA to request public records from a number of public bodies, including the police, the State Law Enforcement Division (SLED), the solicitor's office, the Department of Juvenile Justice, and the South Carolina Department of Corrections.[185]

There are a number of exceptions to FOIAs general rule of disclosure. For example, the definition of "public record" excludes certain types of personal documents, such as personal income tax returns, medical records, and documents containing details regarding the users of public and private libraries.[186]

180. S.C. CODE ANN. § 30-4-15 (2003).

181. Bellamy v. Brown, 408 S.E.2d 219, 221 (S.C. 1991).

182. S.C. CODE ANN. § 30-4-30(a) (2003).

183. S.C. CODE ANN. § 30-4-20(a) (2003).

184. S.C. CODE ANN. § 30-4-20(c) (2003).

185. *See* § 30-4-20(a); *see also* Burton v. York County Sheriff's Dep't, 594 S.E.2d 888, 893 (S.C. Ct. App. 2004) ("The Sherriff's Department, therefore, clearly falls within the compass of the plain meaning of 'public or governmental body or political subdivision of the State' under section 30-4-20(a).").

186. S.C. CODE ANN. § 30-4-20(c) (2003).

Further, § 30-4-40 exempts a variety of matters from disclosure.[187] In particular for our purposes here, § 30-4-40(a)(3) provides an exception for records of law enforcement agencies that were compiled during the process of investigating a crime if the disclosure would harm the agency by: (A) disclosing the identity of informants not otherwise known; (B) prematurely releasing information to be used in a prospective law enforcement action; (C) disclosing investigatory techniques not otherwise known outside the government; (D) endangering the life, health, or property of any person; or (E) disclosing any contents of intercepted wire, oral, or electronic communications not otherwise disclosed during trial.[188] Consistent with FOIAs goal of broad disclosure, however, "the exemptions from its mandates are to be narrowly construed."[189] For example, many of the above exceptions do not apply in cases in which the investigation has closed, a trial has already occurred, or both.[190] In any event, the public body bears the burden of asserting and proving that an exemption applies.[191] For a PCR applicant, the first step is simply to submit a written request for the desired documents.

Finally, FOIA allows the public body to reduce or waive search and copying fees when release of the requested information would be "in the public interest."[192] Indigent applicants, especially, may have success with requests that public bodies waive the applicable fees. At a minimum, FOIA mandates that "[t]he records must be furnished at the lowest possible cost to the person requesting the records."[193]

For federal agencies, the federal Freedom of Information

187. S.C. CODE ANN. § 30-4-40 (2003).

188. § 30-4-40(a)(3).

189. *Burton*, 594 S.E.2d at 893.

190. *See, e.g.*, Evening Post Publ'g Co. v. City of N. Charleston, 611 S.E.2d 496, 499 (S.C. 2005) ("[Freedom of Information Act] exemption is intended to prevent harms such as those caused by release of a crime suspect's name before arrest, the location of an upcoming sting operation, and other sensitive law-enforcement information.").

191. *Id.* at 499.

192. S.C. CODE ANN. § 30-4-30(b) (2003).

193. *Id.*

Act[194] includes similar provisions as the South Carolina FOIA. It is codified at 5 U.S.C. § 552.[195]

iv. Funds for Investigative and Expert Services

The PCR Act provides that indigent applicants shall receive funding for court costs and expenses of representation "in amounts and to the extent funds are made available to indigent defendants" at trial.[196] The South Carolina General Assembly has allotted five hundred dollars for investigative and expert services; however, the court may award additional funds upon a showing that the services are reasonable and necessary.[197] An applicant in need of additional funds generally files a motion asking the court to award the funds and explaining why the services are needed.

In capital cases, the PCR Act clearly provides that the court shall determine the payment of funds for investigative and expert services in an ex parte proceeding.[198] In a handful of recent capital PCR cases, however, the State has argued that the ex parte nature of requests for funding applies only in criminal trials and not in capital post-conviction proceedings.[199] The State

194. 5 U.S.C. § 552 (2006).

195. The Freedom of Information Act Service Center provides an online guide to using the federal Freedom of Information Act. Federal Open Government Guide, (Corina J. Zarek ed., The Reporters Committee for Freedom of the Press, 10th ed. 2009), http://www.rcfp.org/fogg/index.php?i=pt1 (last visited November 21, 2009).

196. S.C. CODE ANN. § 17-27-60 (2003).

197. S.C. CODE ANN. § 17-3-50(B), (C) (2003).

198. *See* S.C. CODE ANN. § 17-27-160(B) (2003) (requiring payment in the same manner and rate as provided for appointed trial counsel in S.C. CODE ANN. § 16-3-26 (2003), which requires ex parte proceedings for the court's determination of funding issues).

199. *See* Return to Motion to Permit Applicant to Seek Funding By *Ex Parte* Proceedings, Simmons v. Maynard, C/A No. 2003-CP-18-1192 (Ct. Com. Pl. Aug. 10, 2005); Motion to Prohibit Ex Parte Communication, Stone v. South Carolina, C/A No. 2008-CP-43-00905 (Ct. Com. Pl. Apr. 18, 2008). *See also* Letter from Donald J. Zelenka, Assistant Deputy Attorney General, State of South Carolina, to The Honorable Wyatt T. Saunders, Circuit Court Judge, South Carolina Circuit Court, Eighth Circuit (Apr. 11, 2002) (responding to applicant's motion to conduct all proceedings ex parte in Hughey v. Maynard, C/A No. 00-CP-01-0212) (on file with author).

bases this argument entirely on a footnote in *Thames v. State*[200]—a non-capital case in which the ex parte nature of funding requests was not at issue and which was decided before the enactment of the current controlling statutory provision.[201] To our knowledge, the State has never succeeded in its efforts to participate in proceedings for the determination of funding in capital PCR proceedings.[202]

Although *Thames*'s application has not been challenged in non-capital PCR cases, there are several grounds upon which such a challenge could (and should) be based. As explained above, the language contained in footnote 1 of *Thames* is dicta—the ex parte nature of funding requests was never at issue in that case. Moreover, denial of ex parte proceedings for indigent defendants who request funding for expert and investigative services in any PCR action could infringe upon the applicant's constitutional rights. Allowing the State to participate in the

200. 478 S.E.2d 682 (S.C. 1996) (per curiam).

201. In *Thames*, the PCR applicant did not seek ex parte review of her request for expert services. *Id.* at 682 n.1. Neither Thames nor the State raised the ex parte issue on appeal. *Id.* Accordingly, a non-capital PCR applicant's right to ex parte application for funding has never been considered by the South Carolina Supreme Court in a contested, adversarial proceeding. Second, *Thames* dealt with non-capital proceedings. Funding for non-capital PCR proceedings are controlled by S.C. CODE ANN. sections 17-27-60 and 17-3-50 (2003). Funding for capital PCR proceedings, however, are controlled by an entirely different statutory provision–S.C. CODE ANN. section 17-27-160 (2003)–which was not discussed in *Thames* and, indeed, could not have been since *Thames* was decided before the legislature enacted that provision.

202. *See* Order Granting Motion to Reconsider Order Denying Requests to Conduct All Proceedings with Respect to Applicant's Requests for Expert, Investigative or Other Services Ex Parte, Hughey v. Maynard, C/A No. 00-CP-01-212 (Ct. Com. Pl. Dec. 18, 2002); Applicant's Motion to Permit Applicant to Seek Funding by Ex Parte Proceedings, Simmons v. Maynard, C/A No. 2005-CP-18-1368 (Ct. Com. Pl. Feb. 3, 2006). One court has ordered the parties to comply with a hybrid procedure set forth in *State v. Row,* 955 P.2d 1082 (Idaho 1998), *cert. denied*, 119 S. Ct. 415 (1998), under which the applicant moves for funds under seal to the court while merely notifying opposing counsel that such request has been submitted. *See* Order, Simmons v. Maynard, C/A No. 2005-CP-18-1368. Under *Row*, the "applicant, however, is *not required to disclose to opposing counsel the nature or contents of his submission to the court.*" *Id.* (emphasis added). After reviewing the request for funds, the court enters an order under seal. Opposing counsel receives notice that the court entered an order with respect to funding, "*but [r]espondents shall receive no further information.*" *Id.* (emphasis added).

funding request could violate the Due Process Clause by providing the State with strategic information it would not otherwise be entitled to, such as which experts the applicant may desire to consult but not call as a witness at the PCR hearing. This result would be particularly unfair given that the State is not similarly required to make these types of disclosures to PCR applicants. Moreover, indigent applicants would have to reveal this information to the State only because they are indigent, in violation of equal protection. "[F]undamental fairness entitles indigent defendants to an 'adequate opportunity to present their claims fairly within the adversary system.'"[203] This promise of "an adequate opportunity"[204] vanishes if the State, with its nearly unlimited resources to investigate a PCR applicant's case at all phases of litigation,[205] has access to privileged information only because of an applicant's indigent status. As the South Carolina Supreme Court has explained:

> Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.[206]

C. Summary Disposition

Either party may move for summary judgment on the PCR application at any time. The PCR court may grant such a motion "when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving

203. Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (internal quotations omitted).

204. *Id.*

205. *See* Bailey v. State, 424 S.E.2d 503, 506 (S.C. 1992) (contrasting the resource constraints faced by defense counsel with those of the "publicly compensated solicitor, who has at his disposal the entire array of state, county, and municipal law enforcement," as well as access to "dramatic technological advances" and other experts).

206. *Ex parte* Lexington County, 442 S.E.2d 589, 594 (S.C. 1994).

party is entitled to judgment as a matter of law."[207] Moreover, the PCR court may sua sponte indicate its intention to dismiss the application because there is no material issue of fact.[208] If, at any time, the court is satisfied "on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, [the court] may indicate to the parties its intention to dismiss the application and its reasons for so doing."[209] The applicant must be given an opportunity to respond to the proposed dismissal.[210] In light of the applicant's response, or lack thereof, "the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue."[211]

D. Expedited Procedures for Capital Cases

In 1996, the legislature amended the PCR Act by, among other things, adopting section 17-27-160, designed to expedite procedures in capital PCR cases.[212] This section requires that two qualified[213] counsel be "immediately"[214] appointed for

207. S.C. CODE ANN. § 17-27-70(c) (2003).

208. § 17-27-70(b).

209. *Id.*

210. *Id.*

211. *Id.*

212. S.C. CODE ANN. § 17-27-160 (2003).

213. To be considered qualified, the statute provides that counsel must "meet the minimum qualifications set forth in section 16-3-26(B) and section 16-3-26(F)" and "have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense." S.C. CODE ANN. § 17-27-160(B) (2003). However, on August 15, 2003, Chief Justice Toal issued a memorandum to all circuit court judges informing them that "[i]t is my opinion that the second clause: or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense does not modify the first clause but is a separate way to become qualified under the rule." *See* Memorandum from Jean H. Toal, Chief Justice, The Supreme Court of South Carolina on Appointment of Counsel in Capital Post-Conviction Relief Matters to all Circuit Court Judges (Aug. 13, 2003) (on file with author), *available at* http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=165. Thus, in effect, no specialized training in capital defense is required to be

indigent PCR applicants who have been sentenced to death.[215] The State's return is due within thirty days upon receipt of the PCR application.[216] Within thirty days after the filing of the State's return, the PCR Act provides that "the judge shall convene a status conference to schedule a hearing on the merits."[217]After the hearing, the PCR judge must issue specific findings of fact and conclusions of law within thirty days from receipt of the transcript or receipt of any post-trial briefs, whichever is later.[218] Court reporters are required to give priority to capital PCR proceedings.[219]

E. Obtaining a Stay of Execution Pending PCR in Capital Cases

If the PCR applicant is a death-sentenced inmate, he must take additional steps to ensure that his execution date is stayed, allowing him to pursue state post-conviction relief. If a defendant's death sentence is upheld by the South Carolina Supreme Court on direct review, the clerk of the court will automatically issue an execution notice instructing the South Carolina Department of Corrections to carry out the execution on the fourth Friday following receipt of the notice by the appropriate prison officials.[220] The mere filing of a PCR application does not itself work to stay the execution date. "If the defendant desires a stay to pursue state post-conviction relief," he must file a motion to stay with the South Carolina Supreme Court within ten days of the date on which the execution notice was issued.[221] The motion must set forth "the issues intended to

qualified as counsel in a capital PCR proceeding.

214. Although the statute requires the immediate appointment of two qualified counsel, that is not what occurs in practice. In fact, counsel are not appointed in capital PCR cases until *after* the death-sentenced inmate has requested and obtained a stay of his execution date. See subsection E for more detail on obtaining a stay.

215. S.C. CODE ANN. § 17-27-160(B) (2003).

216. *Id.*

217. § 17-27-160(C).

218. § 17-27-160(D).

219. § 17-27-160(E).

220. S.C. CODE ANN. § 17-25-370 (2003).

221. *In re* Stays of Execution in Capital Cases, 471 S.E.2d 140, 141 (S.C.

be raised in the application for post-conviction relief."[222] Upon receipt of the motion to stay, the court will assign a circuit court judge to the PCR case and issue a stay of execution.[223] Within thirty days of the date of the stay order, the PCR judge must make an appointment of counsel if the defendant is indigent and desires to be represented by counsel.[224]

V. PLEADING CONSIDERATIONS

A. Considerations on the Scope of Pleading

South Carolina law is somewhat unclear on the exact scope of pleading required in PCR applications. In general, post-conviction is considered a *civil* proceeding, and the South Carolina Rules of Civil Procedure generally require "notice pleading" rather than "fact pleading" in civil actions.[225] In other words, South Carolina's civil rules "merely require that the pleadings give notice of the claim being made against the adversary and of the grounds upon which it rests, rather than allege in detail the specific facts upon which the claim is based."[226] The purpose of notice pleading "is simply to give fair notice to the opposing party"[227] of the legal claims, but the "[r]esolution of facts which sustain a pleading is left to discovery."[228] The PCR Act and Form 5 are consistent with the notice pleading regime in that they require the applicant to specifically identify the grounds (or legal claims) upon which the

1996).

222. *Id.*

223. *Id.*

224. *Id.*

225. *See* Austin v. Bd. of Zoning Appeals, 606 S.E.2d 209, 214 (S.C. Ct. App. 2004) (acknowledging that South Carolina's Rules of Civil Procedure ascribe to "the lenient notice pleading regime"); *see also* S.C. R. CIV. P. 8(a) (requiring that pleadings contain "a short and plain statement of the facts showing that the pleader is entitled to relief"); S.C. R. CIV. P. 8(b) (requiring that defenses be asserted by stating "in short and plain terms the facts constituting . . . defenses to each cause of action asserted").

226. 61A AM. JUR. 2d *Pleading* § 5 (1999) (internal citations omitted) (explaining the difference between fact and notice pleading).

227. Campbell v. Ethex Corp., 413 F. Supp. 2d 738, 740 (W.D. Va. 2006).

228. Studelska v. Avercamp, 504 N.W.2d 125, 127 (Wis. Ct. App. 1993).

application is based and give a "concise" statement of the facts to support each ground.[229] In theory, therefore, notice pleading is all that is required to initiate PCR proceedings,[230] but there are a few qualifications to this point.

First, as explained above,[231] formal discovery is not guaranteed except in capital cases. Thus, the general civil notion that one can always start by giving basic notice of his claims and then support them with detailed facts after discovery will not apply in every PCR case.

Second, in capital as well as non-capital cases, it is not uncommon for the State to move for dismissal or summary judgment simultaneously upon making a Return to the Application. The application should be prepared with an eye toward surviving both of these challenges.

Finally, counsel and pro se applicants should be aware that the PCR Act provides that allegations of ineffective assistance of counsel will result in an automatic wavier of the attorney-client privilege "to the extent necessary for prior counsel to respond to the allegation."[232] Trial or appellate counsel "alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness."[233] Recently, the South Carolina Supreme Court granted certiorari in *State v. Binney*[234] to determine a question concerning the scope of this waiver.[235] Jonathan Binney is a death-sentenced inmate.[236] After exhausting his remedies on direct appeal, Binney filed a

229. S.C. CODE ANN. § 17-27-50 (2003); S.C. R. CIV. P. FORM 5.

230. The PCR Act itself does not specifically say otherwise. Moreover, S.C. R. CIV. P. 71.1(a) provides that the South Carolina Rules of Civil Procedure apply in PCR cases to the extent that they are not inconsistent with the Act, and there is no dispute that the civil rules generally require only notice pleading.

231. *See supra* Part IV.B.iii.

232. S.C. CODE ANN. § 17-27-130 (2003).

233. *Id.*

234. 608 S.E.2d 418 (S.C. 2005), *cert. granted* (Aug. 22, 2008) (on file with author).

235. The authors are serving as counsel for Mr. Binney in his PCR proceedings and before the supreme court.

236. *Binney*, 608 S.E.2d 418.

PCR application in which he alleged various reasons.[237] In

237. In particular, Binney's allegations of trial counsel's ineffectiveness were:

> 10(a): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.
>
> 11(a): Supporting facts: Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See* Strickland v. Washington, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:
>
> 1) Counsel failed to ensure that jurors were not aware that applicant was shackled during proceedings.
>
> 2) Counsel failed to seek an instruction stating that a burglary charge must set forth one, specific crime intended upon entry and stating what the specific crime was in this case.
>
> 3) Counsel failed to seek an instruction stating the specific elements of the crime named in the burglary charge.
>
> 4) Counsel failed to adequately investigate the facts and circumstances surrounding the death of the victim. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of applicant's guilt or innocence. *See* Wiggins v. Smith, 539 U.S. 510 (2003).
>
> 10(b): Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.
>
> 11(b): Supporting facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:
>
> 1) Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence. *See Wiggins v. Smith*, 539 U.S. 510 (2003). As a result of counsel's failure to uncover and present this evidence, applicant's death sentence is unreliable.
>
> 2) Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the

response to these allegations, one of Binney's trial attorneys provided a copy of his *entire* trial file to representatives from the attorney general's office who were representing the State in Binney's PCR proceeding.[238] Binney argued that he did not waive his attorney-client privilege with respect to the entire file because much of the material contained in the file was not "necessary" to respond to any claim of ineffective assistance alleged in his PCR application.[239] The PCR court, however, ruled that Binney's allegations of ineffectiveness were stated in broad and general terms and thus the entire trial file was responsive to the application.[240] In other words, the lower court ruled that the PCR Act permits a complete waiver of the attorney-client privilege when the application alleges broad or general claims of ineffective assistance.[241] On September 21, 2009, the South Carolina Supreme Court held that trial counsel's complete disclosure of the file was justified under the statute.[242] Moreover, the court ruled that the allegations contained in the initial application for PCR control the scope of the waiver, regardless of any subsequent amendments.[243] This ruling is problematic for a number of reasons. First, in capital cases, the initial application for post-conviction relief is routinely prepared by the Office of Appellate Defense. At the time the application is prepared, appellate defense does not have access to a copy of trial counsel's files; does not have sufficient time to review the files even if it did have access; and does not have the time, opportunity or funds to conduct an investigation into potential post-conviction claims.

Moreover, the statute—and the supreme court's interpretation of it—is not limited to capital cases. In non-capital PCR cases, the inmates file their PCR applications pro se

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> prosecution. As a result of counsel's failure to make all appropriate objections, applicant's death sentence is unreliable.

Joint Appendix to Writ of Certiorari at 11–12, Binney v. State, No. 26723 (S.C. Sept. 21, 2009).

238. *Id.* at 24–26.

239. *Id.* at 45–46.

240. *Id.* at 88–89.

241. *Id.*

242. Binney v. State, No. 26723 (S.C. Sept. 21, 2009).

243. *Id.*

and often include generally stated claims of ineffective assistance of counsel. As explained previously, Chief Justice Toal recently ordered that the appointment of PCR counsel in non-capital cases is appropriate only after the attorney general's office has filed its return to the PCR application, in which the attorney general's office must state whether or not it requests that counsel be appointed for the applicant.[244] Thus, the attorney general's office could determine that a pro se PCR applicant has waived the attorney-client privilege entirely and, further, that he or she is not entitled to the appointment of counsel at all. Many unsuspecting inmates could forfeit their right to protect the attorney-client privilege simply by attempting to pursue post-conviction relief—with no assistance from counsel at any time. Such a system is unworkable, unreasonable, and unfair.

To prevent an overly broad waiver of the attorney-client privilege while simultaneously protecting the inmate's right to pursue post-conviction relief on all possible grounds, we recommend that the allegations in the initial application contain specific and narrowly pleaded claims whenever possible. Further, where applicable, we recommend including a general statement in the initial application that the inmate believes she has additional claims for post-conviction relief, but does not yet have collateral counsel, access to the discovery process, or funds for expert services to investigate these claims. After post-conviction counsel have been appointed and have had an opportunity to investigate the applicant's potential claims, counsel may amend the application to include additional claims.[245] The sample applications in Appendix C are designed to address these issues.[246]

244. *See* Order Appointment, *supra* note 166.

245. *See* S.C. R. CIV. P. 15 (leave to amend "shall be freely given when justice so requires").

246. App. C may be accessed at http://www.deathpenaltyresource.org/. In addition to the pleading considerations discussed in this section, we also note that the South Carolina Supreme Court recently determined, as a matter of first impression, that S.C. R. CIV. P. 11, which authorizes sanctions for frivolous pleadings, does not apply to PCR proceedings. Hiott v. State, 674 S.E.2d 491, 495 (S.C. 2009).

B. Pleading Considerations for Federal Habeas Corpus

In raising issues in state post-conviction, counsel and pro se applicants should keep in mind that federal habeas relief is available to state prisoners only after they have exhausted their claims in state court.[247] In other words, a state prisoner "must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."[248] "State courts, like federal courts, are obliged to enforce federal law."[249] The exhaustion doctrine requires that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts must have the first opportunity to review this claim and provide any necessary relief.[250] The purpose of the rule is to "reduce[] friction between the state and federal court systems by avoiding the 'unseem[liness]' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance."[251] To satisfy the exhaustion requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."[252] In South Carolina, the exhaustion doctrine is satisfied if the claim has been "fairly presented" once to the South Carolina Supreme Court,[253] and, *probably*, if the claim has been presented one time to *either* the South Carolina Court of Appeals *or* the South Carolina Supreme Court.[254] For example, if the defendant raises

247. 28 U.S.C. §§ 2254(b)(1), (c).

248. O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

249. *Id.* at 844.

250. *E.g.*, Rose v. Lundy, 455 U.S. 509, 515–16 (1982).

251. *O'Sullivan*, 526 U.S. at 845.

252. *Id.*

253. *Id.* at 848. "The exhaustion doctrine . . . turns on an inquiry into what procedures are 'available' under state law." *Id.* at 847.

254. In *In re* Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 471 S.E.2d 454 (S.C. 1990) [hereinafter *In re Exhaustion*], the South Carolina Supreme Court stated:

> [I]n all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and

the claim on direct appeal, he does not have to raise it again in the state PCR proceedings.[255] Furthermore, the exhaustion doctrine is satisfied even if the state court does not fully consider the claim, as long as it had a fair opportunity to do so because it was reasonably informed of the nature of the claim.[256] In general, this means that the state courts must be given the relevant facts and law and must be apprised that the claim rests,

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> certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.

Id.; *see also* Ellison v. State, 676 S.E.2d 671, 672 (S.C. 2009) (holding that the South Carolina Supreme Court will not entertain petitions for writs of certiorari under S.C. APP. CT. R. 226, where the court of appeals has issued an order denying a writ of certiorari in a PCR matter or when the court of appeals initially grants certiorari but later dismisses the writ as improvidently granted without further discussion, and further holding that this decision does not preclude federal habeas corpus review). In *O'Sullivan*, the United States Supreme Court held that a prisoner must seek discretionary review from the Illinois Supreme Court after an adverse decision from the court of appeals because discretionary review was an "available" state remedy in Illinois. *O'Sullivan*, 526 U.S. at 848 ("The creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable."). In its majority opinion, however, the Court also cited *In re Exhaustion* and noted that "nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable." *Id.* at 847; *see also id.* at 849–50 (Souter, J. concurring) (stating that the majority opinion should not be read to require state prisoners to seek discretionary review in order to satisfy the exhaustion doctrine, where states have clearly indicated that they do not wish prisoners to do so for federal exhaustion purposes); *Id.* at 861 (Stevens, J. dissenting) ("Thankfully, the Court leaves open the possibility that state supreme courts with discretionary dockets may avoid a deluge of undesirable claims by making a plain statement – as . . . South Carolina ha[s] done – that they do not wish the opportunity to review such claims before they pass into the federal system.") (internal citations omitted); *Id.* at 864 (Breyer, J. dissenting) (noting that "Justice Souter's concurring opinion suggests that a federal habeas court should respect a State's desire that prisoners *not* file petitions for discretionary review, where the State has expressed the desire clearly").

255. *E.g.*, *Rose*, 455 U.S. at 518.

256. *See* Anderson v. Harless, 459 U.S. 4 (1982) (per curiam); *see also* Picard v. Connor, 404 U.S. 270, 275–76 (1971) (discussing the requirements of the exhaustion doctrine); Wise v. Warden, 839 F.2d 1030, 1033 (4th Cir. 1988) (applying the exhaustion doctrine).

in whole or in part, on the federal Constitution.[257] Thus, for pleading purposes, counsel should ensure that all grounds for post-conviction relief fairly inform the court of the relevant facts and the claim's federal constitutional basis.

For the same and other similar reasons, counsel should make certain to plead on both substantive and ineffective assistance of counsel grounds for un-objected trial error. For example, if trial counsel fails to object to inadmissible testimonial hearsay evidence, the application should allege ineffective assistance of counsel for failure to object and properly preserve the claim for appellate review *and* that the applicant's conviction or sentence was obtained in violation of the Sixth Amendment's Confrontation Clause. Similarly, if trial counsel failed to investigate, discover, and present evidence that a capital defendant suffers from mental retardation, the application should allege ineffective assistance of counsel for failure to discover and present the evidence *and* that the applicant's death sentence violates *Atkins v. Virginia*[258] and the Eighth Amendment to the United States Constitution because the applicant is mentally retarded.

VI. EVIDENTIARY HEARINGS

Evidentiary hearings are generally held during post-conviction terms of court scheduled by the Office of Court Administration. Most judicial circuits have two or more post-conviction terms per year. In capital cases, hearings generally take place at special terms of court requested by the attorney general or scheduled with the consent of both parties.

At the hearing, the applicant, as the moving party, presents his evidence first and has the burden to prove, by a preponderance of the evidence, that he is entitled to the relief sought in the application.[259] Any allegation that trial counsel

257. *See Anderson*, 459 U.S. at 4.

258. 536 U.S. 304 (2002).

259. S.C. R. CIV. P. 71.1(e); *see* Cobbs v. State, 408 S.E.2d 223, 225 (S.C. 1991) (citing Griffin v. Warden, 286 S.E.2d 145 (S.C. 1982)); Butler v. State, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 300 S.E.2d 482 (S.C. 1983)).

was ineffective for failing to investigate, present evidence, or call a witness must generally be supported by the applicant's own evidence of what the omitted testimony would have been or what the complete investigation would have produced. Applicants routinely lose claims at the PCR stage for failing to offer evidence to support the claim.[260] The applicant may present evidence through affidavits, depositions, and oral testimony.[261] Sworn affidavits are admissible in PCR proceedings in the discretion of the trial judge.[262] Thus, they are admissible and competent as evidence under the statute. The use of affidavits can significantly reduce the amount of time needed for the evidentiary hearing and spare the court and potential witness unnecessary inconvenience, particularly where a witness has only a minor role to play in the overall hearing.

Pre-trial briefs can be helpful in introducing the court to the relevant facts and law. Counsel should treat a PCR hearing as she would any other civil non-jury trial. In many cases, the judge presiding over the evidentiary hearing knows little or nothing about the facts and circumstances of the case. A trial brief summarizing the evidence presented at the applicant's trial and

260. *See, e.g.*, Rollison v. State, 552 S.E.2d 290 (S.C. 2001) (applicant did not establish that trial counsel was ineffective by failing to challenge the legality of the weapons frisk that led to discovery of crack cocaine on applicant's person where the applicant did not offer any evidence that the search was, in fact, unconstitutional); Bannister v. State, 509 S.E.2d 807, 809 (S.C. 1998) ("PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify . . . .") (emphasis omitted); Palacio v. State, 511 S.E.2d 62, 66 (S.C. 1999) ("Since the contents of these documents were never revealed at the PCR hearing, Defendant has failed to present any evidence of probative value demonstrating how the failure to obtain the unproduced statements or acquire the other documents in a more timely fashion prejudiced the defense."); Moorehead v. State, 496 S.E.2d 415, 417 (S.C. 1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.").

261. S.C. CODE ANN. § 17-27-80 (2003); *see* Simpson v. Moore, 627 S.E.2d 701, 712 (S.C. 2006) (finding that the PCR court did not err in allowing the applicant to introduce over forty depositions and approximately twenty-two affidavits into evidence in lieu of live testimony).

262. *Simpson*, 627 S.E.2d at 712; Beckett v. State, 294 S.E.2d 46, 47 (S.C. 1982).

introducing the court to the issues presented in the PCR application can be invaluable to the court's understanding of the case.[263] Similarly, if evidentiary issues will likely arise at the hearing, counsel should prepare a memorandum or series of memoranda on those issues.

VII. POST-HEARING PROCEDURE

A. In the PCR court

Counsel should seek leave to file a post-hearing brief in complicated cases, cases involving the testimony of several witnesses, those containing a number of issues, or other appropriate cases. In such cases, it is also best to review the transcript of the evidentiary hearing before preparing the post-hearing brief. In capital PCR cases, counsel for both applicant and the respondent typically file post-hearing briefs. Generally, courts will allow a capital PCR applicant to file a post-hearing brief within thirty to forty-five days after receipt of the hearing transcript. The respondent receives a similar amount of time to file a post-hearing brief in response to the applicant's.

The PCR court will issue its final decision in a written order. The PCR Act requires the court's order to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."[264] In order to preserve all issues for appellate review, counsel must carefully review the final order and address any insufficiency through a Rule 59(e) motion requesting the PCR court to specifically address each issue raised in the application.[265] In several past cases, where the final order lacked specific findings of fact and conclusions of law, the South Carolina Supreme Court has overlooked the failure to file a Rule 59(e) motion and remanded for specific findings (or, in some cases, a new hearing) in order to address the pervasive problem of inadequate orders.[266] But, recently, the court made clear that

263. The authors will provide counsel with a sample pre-trial brief upon request.

264. S.C. CODE ANN. § 17-27-80 (2003).

265. Marlar v. State, 653 S.E.2d 266, 267 (S.C. 2007) (per curiam).

266. *See, e.g.*, McCullough v. State, 464 S.E.2d 340, 341 (S.C. 1995)

this past practice would not continue, stating that its past practice was a "unique" situation in which "the Court attempted to remind circuit court judges and parties that: (1) specific findings of fact and conclusions of law were required; and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review."[267] Despite these efforts, inadequate PCR orders continue to be a problem: "Although the [past] cases apparently have not accomplished the Court's goal, they do not change the general rule that issues which are not properly preserved will not be addressed on appeal."[268]

In addition to the situation when a court fails to address one or more PCR issues, a Rule 59(e) motion may also be used when the order contains an erroneous finding of fact, a misapplication of law, or if there has been intervening authority relevant to an issue in the case.

Counsel should keep in mind that courts will often ask the prevailing party to prepare an order. When this occurs, counsel should object to allowing the attorney general's office to prepare the written order on the basis that the practice is disfavored by the South Carolina Supreme Court, particularly in capital cases, and it greatly increases the chances that the order will fail to make appropriate and specific findings with respect to each issue presented. The supreme court has said that it "strongly encourage[s] PCR judges to draft their own findings of fact and conclusions of law in death penalty cases."[269] Even if the objection is overruled and the court requests the prevailing party

(remanding matter to PCR court, despite the fact that no Rule 59(e) motion had been filed, and admonishing all parties to carefully prepare and review PCR orders to ensure that they specifically address the issues raised and make conclusions of law); Pruitt v. State, 423 S.E.2d 127, 128 (S.C. 1992) (vacating and remanding the PCR court's order, despite lack of Rule 59(e) motion, to address the failure of many PCR orders to address all the issues raised); McCray v. State, 408 S.E.2d 241, 241 (S.C. 1991) (reversing order denying applicant relief and remanding for a new PCR hearing where PCR court's order failed to make specific findings of fact and conclusions of law sufficient for appellate review).

267. *Marlar*, 653 S.E.2d at 267.

268. *Id.*

269. Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004).

to draft the order, the court may only do so if "the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions."[270] Further, the supreme court has repeatedly reminded all involved parties that:

> [c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP.[271]

A Rule 59(e) motion must be served within ten days of receiving written notice of the entry of the order denying post-conviction relief.[272] Filing a Rule 59(e) motion also tolls the time for filing a notice of intent to appeal.[273]

B. Appeal from the PCR Court's Decision

A final decision entered under the PCR Act is reviewable by the South Carolina Supreme Court upon a petition for a writ of certiorari by either party.[274] To appeal from the denial of PCR relief, counsel must serve a notice of appeal on opposing counsel within thirty days after receipt of written notice of entry of the order denying relief.[275] If a timely Rule 59(e) motion to alter or amend the judgment was filed, then the notice must be filed thirty days after written notice of entry of the order denying the motion.[276] In some cases, the parties may wish to file cross-appeals. In such a case, notice of the cross-appeal must be filed

270. *Id.* at 341 (quoting S.C. APP. CT. R. 501, Cannon 3 B(7)(e)).

271. *Pruitt*, 423 S.E.2d at 128; *see also Marlar*, 653 S.E.2d at 267; *Hall*, 601 S.E.2d at 341.

272. S.C. R. CIV. P. 59(e).

273. S.C. R. CIV. P. 59(f).

274. S.C. APP. CT. R. 243(a).

275. *See* S.C. APP. CT. R. 243(b); S.C. APP. CT. R. 203(b)(1).

276. S.C. APP. CT. R. 203(b)(1).

within five days after receipt of appellant's notice of appeal, or within the thirty day time period described above, whichever is later.[277] The notice of appeal must be filed with the clerk of the supreme court and the clerk of the PCR court within ten days after it is served on opposing counsel.[278] If the PCR court determined that the post-conviction relief action is barred as successive or untimely under the statute of limitations, counsel must—at the time the notice of appeal is filed—provide a sufficient explanation as to why the PCR court's determination was improper.[279]

Counsel must order a transcript of the PCR hearing within ten days of service of the notice of appeal.[280] Thirty days after receipt of the transcript, the petitioner must serve an appendix and a petition for writ of certiorari on opposing counsel and must file an original and six copies of the petition, plus two copies of the appendix and a proof of service with the clerk of the supreme court.[281] The appendix must contain the entire PCR hearing transcript, along with anything else in the PCR court record, a copy of the final order, and an index of the items contained in the appendix.[282] The petition should include a list of the questions presented for review, a statement of the relevant material facts, and an argument in support of each question presented.[283] The petition may not exceed twenty-five pages in length without leave of court.[284] Counsel should be sure to raise every issue in the petition for writ of certiorari to prevent procedural default in federal habeas review. The State will have thirty days to serve a return to the petition.[285] The petitioner may file a brief reply to the return if necessary. The supreme court's review is discretionary.[286] Full briefing and review will not be given unless

277. S.C. APP. CT. R. 203(c).
278. S.C. APP. CT. R. 203(d)(1)(B).
279. S.C. APP. CT. R. 243(c).
280. *See* S.C. APP. CT. R. 243(b); S.C. APP. CT. R. 207(a)(1).
281. S.C. APP. CT. R. 243(d).
282. S.C. APP. CT. R. 243(f).
283. S.C. APP. CT. R. 243(e).
284. *Id.*
285. S.C. APP. CT. R. 243(g).
286. Austin v. State, 409 S.E.2d 395, 396 (S.C. 1991) (per curiam); Knight v.

the court grants a writ of certiorari.[287] The court may choose to grant certiorari to consider some, but not all, of the issues raised in the petition. If the court grants a writ of certiorari, the court will set out a schedule for briefs on the merits.

Different rules apply if the PCR court finds that the applicant was denied the right to a direct appeal of his conviction. In such circumstances, the applicant will be entitled to a belated review of direct appeal issues.[288] In *White v. State*, the South Carolina Supreme Court held that trial counsel is obligated to make certain that a defendant is aware of his right to appeal his conviction.[289] In the absence of an "intelligent waiver" by the defendant, counsel should perfect an appeal by either pursuing an appeal on the defendant's behalf or, if appropriate, complying with the procedure set forth in *Anders v. California*.[290] If a defendant did not fully, voluntarily, and intelligently waive his right to appeal or trial counsel otherwise failed to properly perfect the appeal, the following procedure applies:

> (1) When the post-conviction relief judge has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the petition shall contain a question raising this issue along with all other post-conviction relief issues petitioner seeks to have reviewed. At the same time the petition is served, petitioner shall serve and file a brief addressing the direct appeal issues. This brief shall, to the extent possible, comply with the requirements of Rule 208(b). Respondent's return to the petition shall address the post-conviction relief issues, including whether the direct appeal was knowingly and intelligently waived. At the same time the return is due, respondent shall also serve and file a brief addressing the direct appeal issues. Within ten (10) days after service of respondent's brief, petitioner may file a reply brief on

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State, 325 S.E.2d 535, 537 (S.C. 1985) (per curiam); *see also* White v. State, 208 S.E.2d 35, 39 (S.C. 1974).

287. *See* Order Appointment, *supra* note 166.

288. *See, e.g.*, Sheppard v. State, 594 S.E.2d 462, 466 (S.C. 2004) (finding applicant was entitled to a belated appeal where his decision not to pursue direct appeal was based on erroneous advice from trial counsel).

289. 208 S.E.2d at 39.

290. 386 U.S. 738, 744 (1967).

the direct appeal issues.

> (2) When the post-conviction relief judge has found that the applicant is not entitled to a White v. State review, the petition shall raise the question of waiver of the right to a direct appeal along with all other post-conviction relief issues petitioner seeks to have reviewed. The petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a *White v. State* review is granted; this statement of issues shall comply with the requirements of Rule 208(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue.[291]

C. Successive Applications

The PCR Act requires applicants to assert "all grounds for relief available" in the original application.[292] Second, or successive, applications are disfavored and the South Carolina Supreme Court has repeatedly voiced hostility toward them.[293] A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings. The Act provides a very narrow exception to allow a successive PCR application where the applicant can provide a "sufficient reason" for why the ground was not asserted or was inadequately raised in the original application.[294] The court has strictly construed the term "sufficient reason," holding that it means that the ground "could not have been raised" in the previous application.[295] Thus, "as long as it was possible to raise the

291. S.C. APP. CT. R. 243(i).

292. S.C. CODE ANN. § 17-27-90 (2003).

293. *See, e.g.*, Aice v. State, 409 S.E.2d 392, 394 (S.C. 1991); Carter v. State, 362 S.E.2d 20, 21 (S.C. 1987); Land v. State, 262 S.E.2d 735, 737 (S.C. 1980).

294. § 17-27-90.

295. Odom v. State, 523 S.E.2d 753, 755 (S.C. 1999); Tilley v. State, 511 S.E.2d 689, 691 (S.C. 1999). Although no South Carolina court has explicitly addressed the question, the authors believe that circumstances satisfying the PCR Act's exceptions to the statute of limitations (i.e., a new retroactive rule of law and newly discovered evidence as defined by S.C. CODE ANN. section 17-27-45 (2003)) should *invariably* qualify as a "sufficient reason" permitting a successive petition. *C.f.* Franklin v. Maynard, 588 S.E.2d 604, 606 & n.7 (S.C.

argument in [the] first PCR application, an applicant may not raise it in a successive application."[296] The court has rejected the argument that a claim was not raised in the original petition because PCR counsel ineffectively failed to raise it, stating that the court "will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not."[297]

There are some exceptions to the general bar against successive petitions. The court has allowed a successive PCR application where the applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing;[298] where the applicant's trial counsel served as his PCR counsel, thus effectively preventing a claim of ineffective assistance;[299] where the applicant did not have direct review of a claim he brought in PCR due to "so many procedural irregularities;"[300] and where the applicant was denied his right to appeal the denial of his PCR application.[301] In *Aice v. State*, the court explained that every PCR applicant is entitled to a full adjudication on the merits of the PCR application—or "one bite at the apple"—which includes the right to appeal the denial of a PCR application and the right to assistance of counsel in that appeal.[302] Thus, if a PCR applicant requested and was denied an opportunity to seek appellate review from a PCR denial, or if the right to appeal was not knowingly and intelligently waived, an applicant can petition for certiorari to the South Carolina

2003) (per curiam) (allowing an issue to be raised for the first time in a second PCR application in light of a new retroactive rule of law).

296. *Aice*, 409 S.E.2d at 394.

297. *Id.*

298. Case v. State, 289 S.E.2d 413, 413-14 (S.C. 1982).

299. Carter v. State, 362 S.E.2d 20, 21 (S.C. 1987).

300. Washington v. State, 478 S.E.2d 833, 835 (S.C. 1996).

301. Austin v. State, 409 S.E.2d 395, 396 (S.C. 1991) (per curiam). The South Carolina Supreme Court has also suggested that a mentally incompetent PCR applicant should, after regaining competency, be allowed to raise issues in a successive proceeding that could not have been raised earlier because of incompetency. Council v. Catoe, 597 S.E.2d 782, 787 (S.C. 2004). The court has said that such claims must be "fact-based" and that the applicant's incompetency must prevent the applicant from aiding his PCR counsel on that fact-based claim. *Id.*

302. *Aice*, 409 S.E.2d at 395.

Supreme Court for a new appeal.[303] Finally, a successive application may be permitted where the court's refusal to hear the claim would constitute a "gross miscarriage of justice,"[304] where government interference or the reasonable unavailability of the factual basis of the claim impeded counsel's ability to raise the claim,[305] or where some other circumstance beyond the applicant's control occurred.[306]

VIII. OTHER AVAILABLE REMEDIES

A. State Habeas Corpus

The availability of state habeas corpus has been limited by the PCR Act. The Act supersedes and encompasses the common law practice of habeas corpus.[307] However, habeas corpus remains available as an "extraordinary" constitutional remedy in certain narrow circumstances.[308] Habeas corpus is available only when other remedies, such as PCR, are inadequate or unavailable.[309] The PCR Act is considered "broadly inclusive" and will rarely be inadequate or unavailable to test the legality of a detention.[310] Not every constitutional error at trial will justify issuance of a writ of habeas corpus. The writ will only issue when the petitioner's claim meets the *Butler* standard—meaning that a violation has occurred "which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice."[311] The South Carolina Supreme Court has granted the

303. *Id.* To effectuate an applicant's right to appeal a PCR dismissal, the supreme court requires PCR judges to advise *pro se* applicants of both their right to appeal and also their right to appellate counsel when their PCR applications are summarily dismissed. Odom v. State, 523 S.E.2d 753, 756 (S.C. 1999).

304. *Aice*, 409 S.E.2d at 394.

305. *See* McCleskey v. Zant, 499 U.S. 467, 468 (1991).

306. *Id.* at 503.

307. *See* S.C. CODE ANN. § 17-27-20(b) (2003).

308. Gibson v. State, 495 S.E.2d 426, 428 (S.C. 1998).

309. *Id.*

310. *Id.*

311. Butler v. State, 397 S.E.2d 87, 88 (S.C 1990) (italics omitted) (quoting State v. Miller, 84 A.2d 459, 463 (N.J. Super. Ct. App. Div. 1951)).

writ in only a handful of cases.[312]

Procedurally, a petitioner seeking state habeas corpus must first exhaust all available PCR remedies.[313] Exhaustion includes the filing of an application, the rendering of an order adjudicating the issues, and petitioning for or knowingly waiving appellate review.[314] If a petitioner has exhausted PCR remedies, he may file a petition for habeas corpus. The petition must allege that the petitioner has exhausted all other remedies, and it must set out a constitutional claim that meets the *Butler* standard.[315] It must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate. Further, the petition must make out a prima facie case showing that petitioner is entitled to relief, including sufficient factual allegations to support the petition.[316] If the petition does not satisfy the requirements for habeas corpus, the court may treat it as a PCR application.[317]

B. Motion for New Trial Based on After-Discovered Evidence

A motion for a new trial based on after-discovered evidence encompasses claims predicated on the presentation of evidence that existed at the time of trial but of which the defendant was "excusably ignorant."[318] The after-discovered evidence must reflect upon the defendant's innocence or the defendant's moral culpability in capital cases.[319] Generally, a motion for a new trial

312. *See* Tucker v. Catoe, 552 S.E.2d 712, 718 (S.C. 2001); Slack v. State, 429 S.E.2d 801, 802 (S.C. 1993), *overruled on other grounds by* State v. Gentry, 610 S.E.2d 494 (S.C. 2005); *Butler*, 397 S.E.2d at 88.

313. Pennington v. State, 441 S.E.2d 315, 316 (S.C. 1994).

314. Gibson v. State, 495 S.E.2d 426, 428 (S.C. 1998).

315. *Id.* at 429 (citing *Butler*, 397 S.E.2d at 88).

316. *Id.* at 427. The South Carolina Supreme Court recently entertained a state habeas claim by Petitioner, Luke Williams, a death-sentenced inmate, who argued that his death sentence was in violation of the court's recent decision in *State v. Northcutt*, 641 S.E.2d 873, 881–82 (S.C. 2007), related to an improper closing argument by the State. Williams v. Ozmint, 671 S.E.2d 600, 602–03 (S.C. 2008). Following briefing and oral argument, however, the court ultimately denied Williams a writ of habeas corpus. *Id.* at 603.

317. *See* Hunter v. State, 447 S.E.2d 203 (S.C. 1994).

318. State v. Haulcomb, 195 S.E.2d 601, 606 (S.C. 1973).

319. *See* State v. South, 427 S.E.2d 666, 669–70 (S.C. 1993).

should be considered when new evidence is discovered shortly after the trial has concluded or when new evidence is discovered after the completion of state PCR.[320]

"To obtain a new trial based on after-discovered evidence," the petitioner must file a motion pursuant to South Carolina Rule of Criminal Procedure 29(b) "[s]howing that the evidence: 1) would probably change the result if a new trial is had; 2) has been discovered since the trial; 3) could not have been discovered before trial; 4) is material to the issue of guilt or innocence; and 5) is not merely cumulative or impeaching."[321]

If the petitioner alleges that after-discovered evidence affects the penalty in a capital case, the evidence "must be material to any mitigating or aggravating circumstances," as opposed to the defendant's guilt or innocence.[322] The petitioner bears the burden of proof and must satisfy each element for the court to grant the motion.[323] The motion must be filed before the trial court with jurisdiction over the conviction.[324] The provisions of Rule 29(b) place no time limitations on a motion for new trial based on after-discovered evidence[325] but do require that it be filed within a reasonable time after discovery of the evidence.[326] The motion must be supported by affidavits and, if available,

320. Where such evidence is discovered while PCR proceedings are pending, the claim should typically be included in the PCR application. *See* Simpson v. Moore, 627 S.E.2d 701, 708 (S.C. 2006) (holding that applicant was entitled to amend his PCR application to include a claim that the State failed to disclose potentially exculpatory evidence related to the charged offense of armed robbery, where the evidence was discovered during the PCR hearing).

321. State v. Taylor, 508 S.E.2d 870, 879 (S.C. 1998); *see also* S.C. R. CRIM. P. 29(b).

322. *South*, 427 S.E.2d at 670.

323. *See* Hayden v. State, 299 S.E.2d 854, 855 (S.C. 1983).

324. *See* S.C. R. CRIM. P. 29.

325. *See* State v. Spann, 513 S.E.2d 98, 100 (S.C. 1999) (granting motion for new trial where new evidence was discovered eighteen years after the original trial); *see also* State v. Hinson, 361 S.E.2d 120, 121–22 (S.C. 1987) (granting defendant thirty days to renew his motion for a new trial on the basis of non-disclosure of evidence, where the trial judge had failed to rule on that motion, which had been made immediately following trial).

326. Town of Hilton Head Island v. Godwin, 634 S.E.2d 59, 61–62 (S.C. Ct. App. 2006) (finding defendant's motion to set aside the conviction untimely where it was filed approximately eight years after he received notice of the evidence on which the motion was based).

other relevant evidence. The moving party must also submit a personal affidavit supporting the motion, declaring "that he did not know of the existence of such evidence at the time of the trial and that he used due diligence to discover such evidence, or that he could not have discovered it by the exercise of due diligence."[327] The trial judge has broad discretion to either grant or deny the motion, and her decision will not be reversed on appeal unless the defendant can show that it meets the onerous "abuse of discretion" standard.[328]

IX. CONCLUSION

We hope that this article will directly serve as a resource to appointed counsel, pro se litigants, judges, and law clerks involved with post-conviction cases in South Carolina. Moreover, we hope that our discussion of the complexities of the PCR Act and the many pitfalls into which a PCR applicant could fall will highlight the need to afford applicants *greater* access to well-trained and well-funded post-conviction counsel, investigators, and experts—and curb enthusiasm for placing even more restrictions on an already burdened, overlooked, and under-represented class of inmates seeking post-conviction relief in South Carolina.

327. State v. DeAngelis, 182 S.E.2d 732, 735 (S.C. 1971).

328. *See, e.g.*, State v. Edens, 250 S.E.2d 116, 118 (S.C. 1978); State v. Pierce, 207 S.E.2d 414, 417 (S.C. 1974).

APPENDIX A

SUCCESSFUL PCR CASES IN SOUTH CAROLINA

(EXCLUDING IAC CASES)

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I. LACK OF SUBJECT MATTER JURISDICTION

A. Statute Providing for Magistrate Court Jurisdiction

Robertson v. State, 278 S.E.2d 770 (S.C. 1981). Statute providing that crime of passing fraudulent checks "may be tried" in magistrate's court if check is for $100 or less, required prosecution of check for $54 to take place in magistrate's court, and court of general sessions lacked jurisdiction over such offense. *Id.* at 771.

B. Invalid Transfer of Juvenile to General Sessions

Austin v. State, 575 S.E.2d 547 (S.C. 2003). The applicant was fifteen years old when he was charged with armed robbery, assault and battery with intent to kill, and possession of a firearm during the commission of a violent crime. The family court transferred jurisdiction of the offenses to general sessions and the applicant plead guilty. The applicant was denied PCR relief but granted a belated review of his direct appeal under *White v. State*. The court held that possession of a firearm during commission of a violent crime is not a felony enumerated in S.C. Code § 20-7-430(5). Only the offenses specifically enumerated in the statute may be waived up to the court of general sessions. Because the offense of possession of a firearm during commission of a violent crime may not be waived up for fourteen or fifteen year olds, the circuit court was without jurisdiction over the charge and the plea and sentence to possession of a firearm was vacated.

Slocumb v. State, 522 S.E.2d 809 (S.C. 1999). Trial court had no jurisdiction where thirteen year old charged with criminal sexual conduct was transferred to general sessions and offered guilty plea. S.C. Code § 16-3-659 prohibits the transfer of sexual offenses committed by juveniles under fourteen years of age to adult court.

C. No Valid Waiver of Indictment Prior to Plea

Phillips v. State, 314 S.E.2d 313 (S.C. 1984). "Failure of defendant, indicted for kidnapping and robbery, to sign waiver of indictment invalidated his guilty plea to assault and battery of a high and aggravated nature and robbery." *Id.* at 313. Sections 17-23-130 and -140 make a written waiver of presentment of indictments not presented to the grand jury mandatory before the trial judge can accept the plea.

D. Plea to Offense Not Charged in the Indictment

Campbell v. State, 535 S.E.2d 928 (S.C. 2000). Trial court had no jurisdiction where defendant was indicted for Criminal Sexual Conduct (CSC) with a minor but pled guilty to lewd act on child under the age of sixteen. Lewd act is not a lesser included offense of criminal sexual conduct, and grand jury never indicted defendant on lewd act and defendant did not waive indictment.

E. Invalid Amendments That Change the Indicted Offense

Hope v. State, 492 S.E.2d 76 (S.C. 1997). Trial court had no jurisdiction where defendant was indicted for assault with intent to commit third degree criminal sexual assault, but the court allowed the State to amend the indictment at trial to assault with intent to commit first degree criminal sexual assault. Because the nature of the offense was changed, the court lacked subject matter jurisdiction.

Clair v. State, 478 S.E.2d 54 (S.C. 1996). Trial court had no jurisdiction to accept guilty plea to trafficking in cocaine between 200 and 400 grams where the defendant was indicted for between 100 and 200 grams and the indictment was amended prior to the plea. Because the maximum penalty was increased, the nature of the offense was changed and the court lacked subject matter jurisdiction.

F. Failure to Re-Indict Following *Nolle Prosequi*

Mackey v. State, 595 S.E.2d 241 (S.C. 2004). Trial court "should have dismissed the criminal charges, because the

solicitor entered a *nolle prosequi* and thereafter failed to re-indict the defendant upon those charges." *Id.* at 241 (emphasis added).

II. GUILTY PLEA INVALID BECAUSE NOT KNOWING AND INTELLIGENT

Clark v. State, 468 S.E.2d 653 (S.C. 1996). Defendant already serving a federal sentence entered plea based on an agreement accepted by the court that his South Carolina sentences would run concurrent with federal sentence. Because he was being held in a South Carolina prison, however, the federal sentence was not running. Court reversed denial of PCR and ordered that defendant be moved to federal prison where his federal sentence would begin running, or in the alternative, if the federal prison would not take him, to allow defendant to withdraw his guilty plea because the State could not fulfill its pretrial agreement.

Brown v. State, 412 S.E.2d 399 (S.C. 1991). Remanded for new trial where defendant's guilty plea was not made knowingly and voluntarily. Trial judge misinformed defendant at guilty plea hearing that he would be eligible for parole after serving one third of his sentence, when in fact defendant was ineligible for parole.

Dover v. State, 405 S.E.2d 391 (S.C. 1991). Defendant's guilty plea was not voluntarily and understandingly made because he was never made aware that he could be sentenced to as much as 200 years. Judge did not ask defendant any factual questions or question him about the possibility of a severe sentence, and defendant testified that he was led to believe that it was not a major case and he would not get more than ten years.

III. RIGHT TO COUNSEL ISSUES

A. Denial of Counsel

Barlet v. State, 343 S.E.2d 620 (S.C. 1986). Petitioner had a right to counsel at probation revocation hearing and was unlawfully detained without a finding of willful refusal to pay

probation fees and restitution.

B. Denial of Counsel at Critical Stage of Proceedings

McKnight v. State, 465 S.E.2d 352 (S.C. 1995). Defendant convicted of resisting arrest and criminal domestic violence was denied counsel at a critical stage of the proceedings. Defense counsel was not in courtroom during the testimony of the police officer, who was the victim of the resisting arrest, and came in during the defendant's cross examination of the officer. There was no waiver of right to counsel. Court held that Strickland standard used by PCR judge was inappropriate and that prejudice would be presumed.

Locklear v. Harvey, 254 S.E.2d 293 (S.C. 1979). "Where defense counsel was excluded from a meeting between trial judge, rape victim, her mother, and solicitor, and discussion was off the record, defendant's right to counsel at sentencing was effectively denied." *Id.* at 293. Remand for resentencing by another circuit judge was required.

C. Insufficient Warning of Dangers of Waiver of Right to Counsel and Pro Se Representation

Gardner v. State, 570 S.E.2d 184 (S.C. 2002). PCR court erred in finding that petitioner knowingly and intelligently waived his right to counsel prior to entering guilty plea to drug charges. Following arrest, petitioner retained counsel but could not afford legal fees. He discussed a plea with the solicitor and entered a plea with no lawyer present. The trial court judge conducted no inquiry and did not even acknowledge that no counsel was present. While the record revealed that the petitioner was aware of his right to counsel, there was no indication that he was aware of the dangers of self-representation.

Watts v. State, 556 S.E.2d 368 (S.C. 2001). Trial judge did not effectively warn the defendant of the dangers of appearing pro se to plead guilty; the judge did not ask why the defendant dismissed the appointed attorney or if he wished to have counsel present, and the defendant did not say that he wished to waive

his right to counsel or he wanted to represent himself. The court also failed to make a meaningful inquiry into defendant's background to determine whether he had sufficient experience or knowledge to waive counsel at a guilty plea proceeding. The judge asked the defendant for his age and education level and about his first offense; the defendant answered that he was forty-one years old and had graduated from high school, and the solicitor answered the question about a prior conviction.

Stevenson v. State, 522 S.E.2d 343 (S.C. 1999). The record did not "demonstrate petitioner was sufficiently aware of the dangers of self-representation to make an informed decision to proceed pro se during the plea proceeding and probation revocation hearing." *Id.* at 345. Thus, petitioner did not validly waive her right to counsel as no one informed petitioner of dangers and disadvantages of proceeding pro se, petitioner did not have a high school education, and she had appeared in court only one time prior to these proceedings.

Bridwell v. State, 413 S.E.2d 30 (S.C. 1992). Defendant's waiver of right to counsel at trial was not knowing and voluntary where the defendant was not warned of the dangers inherent in self-representation, and there was no evidence that he was otherwise aware of hazards of proceeding pro se.

Salley v. State, 410 S.E.2d 921 (S.C. 1991). Trial court did not properly find that defendant had waived her right to counsel at probation revocation hearing. He did not ask specific questions to determine if she was aware of the dangers of self-representation, and the record indicated that she agreed to proceed without counsel only on the belief that her probation officer would try to get the probation vacated.

Huckaby v. State, 408 S.E.2d 242 (S.C. 1991). Judge's two questions at probation revocation hearing, which merely told probationer of his right to counsel and asked if he wished to waive it, did not satisfy requirement of a hearing to determine whether the waiver of the right to counsel was knowing and intelligent. Petitioner was operating under false impressions regarding the importance of the hearing and the dangers of self-representation.

Prince v. State, 392 S.E.2d 462 (S.C. 1990). Defendant was not sufficiently aware of dangers of self representation to make

informed decision to proceed pro se, where defendant was mentally disturbed and exhibited little understanding of criminal proceedings.

Wroten v. State, 391 S.E.2d 575 (S.C. 1990). Evidence at PCR proceeding did not demonstrate that petitioner was sufficiently aware of the dangers of self-representation to make an informed decision to proceed pro se. The evidence showed that petitioner was forty-five years old, had a fifth grade education, and when the trial judge asked him if he wanted counsel, he said he "didn't know what to do." *Id.* at 577.

IV. STATE MISCONDUCT AND PRESENTATION OF FALSE EVIDENCE

Riddle v. Ozmint, 631 S.E.2d 70 (S.C. 2006) (per curiam). There was no evidence supporting the PCR court's finding that *Brady v. Maryland* was not violated and reversal was required because the State's primary witness, the defendant's co-defendant/brother who was seventeen years old at the time of the trial and also mildly mentally retarded, testified falsely that he had not made any statements other than the initial statement that was disclosed to the defense. The witness had made a prior inconsistent statement that was not disclosed to the defense, and the solicitor failed to correct this false testimony. The PCR judge found that the State did not violate due process because the solicitor may have thought either that the witness misunderstood the questions or that he simply did not recall the recent events. This was error because "[t]he issue is not why [the witness] failed to tell the truth: rather, it is why the solicitor, who knew [the] testimony to be false, failed to correct it." *Id.* at 75. Reversal was required because "[t]he failure to correct false evidence is as reprehensible as its presentation." *Id.*

Simpson v. Moore, 627 S.E.2d 701 (S.C. 2006). The trial court erred in denying relief because the State failed to disclose potentially exculpatory evidence related to the armed robbery charge, which was also a statutory aggravating circumstance. When police arrived at the crime scene, the cash register was open and there were bills in every slot except where the twenty-dollar bills were kept. There was also a bag of money behind the

register, which was given to the victim's brother, who helped run the store. The existence of the bag of money was never disclosed to defense counsel. The State's misconduct was prejudicial. Simpson was granted a new trial on the armed robbery charge. If convicted, a new capital sentencing would also be necessary, because the armed robbery was the sole aggravating circumstance.

Sprouse v. State, 585 S.E.2d 278 (S.C. 2003). The court found that the State failed to honor its plea agreement where the defendant had charges in both Newberry and Laurens Counties and entered into an agreement to plead guilty in exchange for concurrent sentences. When he entered the first plea agreement in Newberry as violent, the solicitor stated his understanding that the subsequent sentences in Laurens would be nonviolent, yet the Laurens solicitor classified the offenses as violent. This could only be interpreted as a deviation from the original plea agreement because both solicitors represented the Eigth Judicial Circuit and were each bound to fulfill the plea agreements made by the other. The case was remanded for resentencing in Laurens consistent with the original plea agreement.

Gibson v. State, 514 S.E.2d 320 (S.C. 1999). Defendant was entitled to a new trial despite his guilty plea based on the State's failure to disclose a witness's inconsistent statement and trip to crime scene. Defendant was charged with murder. He and one eye witness said he had hit the victim in the head with the gun while holding the butt of the gun but not the trigger. The gun accidentally fired and shot the victim who died. The victim's girlfriend, however, stated that she had been looking through the window of the bar where this occurred and saw the defendant point the pistol at the victim and shoot him. Four other witnesses told the police that the girlfriend had been sitting in her car or near it at the time of the shooting and ran inside only after the shot was fired. Defense counsel knew these facts and told the defendant they would likely impeach the girlfriend's testimony, but the defendant opted to plead guilty to voluntary manslaughter. What the defense did not know, however, was that after the initial statement, the police had taken the girlfriend to the crime scene and confronted her with the fact that she could not have seen through the window because the

pictures revealed that there was a game machine in front of the window at the time of the shooting. The girlfriend then said that she must have seen it through the door instead of the window. The court held that the trip to the scene and the material change in the testimony should have been disclosed to the defense. Reversal was also required because there is a big difference between thinking you can impeach the witness and knowing that the State has established the witness's initial statement was untrue, which prompted the victim to change her statement. The court adopts the rule that "a *Brady* violation is material [in the context of a guilty plea case] when there is a reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial." *Id.* at 325.

Washington v. State, 478 S.E.2d 833 (S.C. 1996). Defendant was entitled to new trial in a successive PCR application where the State declared in an opening statement that there was no deal with the State's witness and there was testimony that there was no deal when, in fact, there was a plea agreement between the witness and the State. The court granted relief even though this was a successive PCR application, because Washington had not received due process due to a number of procedural abnormalities, including his attorney's failure to adequately file direct appeal brief and the first PCR court's passing buck to the supreme court even though finding State misconduct.

V. SENTENCING ERRORS

A. Invalid Sentence for Kidnapping Where Defendant Also Sentenced for Murder

Owens v. State, 503 S.E.2d 462 (S.C. 1998). Defendant was convicted of kidnapping in 1985 and sentenced to life. Based on the same facts, he was convicted of murder in 1986 and sentenced to death. After reversal and a retrial on the murder charge, he was again convicted and sentenced to life in 1991. At the time of his 1991 conviction and sentence, the kidnapping punishment statute required a life sentence unless the defendant

was also sentenced to life for murder. Because there is no requirement in the statute that the defendant be tried and sentenced for kidnapping and murder at the same time for the statute to apply, the life sentence for kidnapping should have been vacated once the defendant was convicted and sentenced for the associated murder. The kidnapping sentence was vacated.

B. Invalid Sentencing as Second Offender

Rainey v. State, 414 S.E.2d 131 (S.C. 1992). Defendant was improperly sentenced as a second offender when conflict in the statutes must be resolved in favor of the later, more specific statute, which excluded defendant's earlier convictions from counting to classify him as a "second offender."

C. Sentencing Beyond the Maximum Allowed

Williams v. State, 410 S.E.2d 563 (S.C. 1991). Defendant pled guilty to assault and battery with intent to kill and received extra punishment for displaying "what appeared to be a knife" during the attack. *Id.* at 563. The instrument was actually a barbecue fork, and the trial court was without jurisdiction to accept the plea because the statute clearly states that the weapon involved must be a knife, not what "appears to be a knife." *Id.* at 564.

Fewell v. State, 225 S.E.2d 853 (S.C. 1976). Defendant was sentenced as if he had been convicted of possession with the intent to distribute LSD rather than the simple possession charge for which he was indicted and convicted. Counsel's failure to object to the erroneous instruction regarding applicable punishment did not deprive defendant of the right to be sentenced appropriately. The case was remanded for resentencing.

D. Unreasonable Condition of Probation

Beckner v. State, 373 S.E.2d 469 (S.C. 1988) (per curiam). Condition of probation that defendant not be "in a place of business that sells alcohol" was unreasonable and disproportionate to any rehabilitative function it may have

served. *Id.* at 470 (internal quotation marks omitted).

Henry v. State, 280 S.E.2d 536 (S.C. 1981). Trial judge was without authority to impose banishment from the State in the event that probation was revoked as a condition of probation, even though defendant agreed to the sentence. Defendant did not lack standing to assert this issue in PCR despite the fact that he had not yet violated his probation.

VI. SENTENCE CREDIT ISSUES

Allen v. State, 529 S.E.2d 541 (S.C. 2000). Petitioner entitled to sentence credit on initial charge for time served in confinement following bond revocation and additional charges until trial on all charges.

Blakeney v. State, 529 S.E.2d 9 (S.C. 2000). Petitioner entitled to sentence credit for time served in confinement between arrest and conviction.

Crooks v. State, 485 S.E.2d 374 (S.C. 1997). Petitioner entitled to sentence credit for time served in confinement between arrest and conviction.

VII. PAROLE ISSUES

Kerr v. State, 547 S.E.2d 494 (S.C. 2001). PCR court had jurisdiction to review issue concerning unlawful revocation of parole because PCR statute specifically allows consideration of this issue. Parole was unlawfully revoked based on parole board's improper interpretation of statute concerning parole eligibility applicable at the time. Applicant had been sentenced to "mandatory term" of twenty-five years for drug offense and statute provided at the time that parole eligibility was denied only if sentenced to "mandatory minimum" of twenty-five years. *Id.* at 496.

Jernigan v. State, 531 S.E.2d 507 (S.C. 2000). Statute that changed review for parole eligibility from annual to biannual review violated ex post facto clauses of federal and state constitutions, because the procedural rule is so overly intrusive that it substantively affects the review standard. Issue remanded to administrative agency, because under recent *Al-*

Shabazz ruling, ex post facto claims concerning parole eligibility are no longer cognizable in PCR unless specifically allowed in statute.

Griffin v. State, 433 S.E.2d 862 (S.C. 1993), *cert. denied*, 510 U.S. 1093 (1994). Statute that changed review for parole eligibility from annual to biannual review violated ex post facto clauses of federal and state constitutions because the procedural rule is so overly intrusive that it substantively affects the review standard.

VIII. WAIVER OF DIRECT APPEAL INVALID

Braddock v. State, 545 S.E.2d 498 (S.C. 2001). Voluntary absence from trial does not waive right to direct appeal when defendant is in custody at the time of sentencing and direct appeal. Direct appeal issues considered and affirmed.

Luckett v. State, 462 S.E.2d 858 (S.C. 1995) (per curiam). Petitioner "did not knowingly and intelligently waive his right to a direct appeal." *Id.* at 858. Court reviewed direct appeal issues and affirmed.

Casey v. State, 409 S.E.2d 391 (S.C. 1991). Court held that trial court erred in refusing to charge law on involuntary manslaughter where there was evidence of a struggle over a gun between defendant and third person which resulted in victim being shot.

Matthews v. State, 387 S.E.2d 258 (S.C. 1990). After PCR judge found that there had been ineffective assistance of appellate counsel, briefs were allowed on direct appeal issues and the court held, that because of double jeopardy, defendant could not be convicted of both trafficking in marijuana and the lesser included offense of possession of marijuana with intent to distribute.

Davis v. State, 342 S.E.2d 60 (S.C. 1986). Six step procedure was adopted to be applied when it is found that defendant did not knowingly and voluntarily waive his right to direct appeal from conviction and subsequently seeks review of issues which arose at trial.

IX. COMPETENCY TO BE EXECUTED

Singleton v. State, 437 S.E.2d 53 (S.C. 1993). Defendant convicted of murder was incompetent to be executed because he was completely unaware that he was capable of dying in the electric chair and was incapable of communicating with counsel.

APPENDIX B

SUMMARIES OF PUBLISHED SUCCESSFUL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN SOUTH CAROLINA POST-*STRICKLAND v. WASHINGTON*

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I. TRIAL PHASE

A. Numerous Deficiencies and Inadequate Defense

Lounds v. State, 670 S.E.2d 646 (S.C. 2008). Counsel, who has since been suspended from the practice of law indefinitely for other reasons, was ineffective in armed robbery and kidnapping trial for failing to adequately investigate and present the defense and for making harmful arguments contradictory to the petitioner's testimony in closing. Counsel's conduct was deficient because counsel did not speak to petitioner until the morning the trial began and admitted on the record that he had just learned the name of possible defense witnesses, who were not called because they could not be located during the trial and because counsel "believed the witnesses would not add much to petitioner's defense." *Id.* at 650. Even if this could be considered as a strategic reason, it was "not objectively reasonable given the defense theory of the case." *Id.* In essence, the petitioner testified that he asked the alleged victim for money owed to him due to previous drug dealings, and the victim went with him voluntarily to the victim's parent's house to get money. The victim denied knowing the petitioner, owing him money, or ever buying or using drugs. The defense witnesses the petitioner sought during trial, and who testified in PCR, would have testified that the victim did know the petitioner through drug dealing, which "would have added significantly to the credibility of petitioner's case." *Id.* Counsel's conduct was also deficient in closing argument for asserting that the petitioner had a friend with him for extra "muscle" when the defendant had denied

robbery or kidnapping or any attempt to threaten the victim. *Id.* at 651. Prejudice was found on each individual count because the jury necessarily rejected the victim's testimony in acquitting on the armed robbery.

McKnight v. State, 661 S.E.2d 354 (S.C. 2008). Counsel found ineffective for numerous reasons in retrial of homicide by child abuse involving a full-term stillborn baby with cocaine in its system. The initial autopsy listed three causes of death, one of which was cocaine consumption. The State's theory was that other causes were ruled out and the cocaine use alone caused the death. In an initial trial, the defense presented two experts. The first completely contradicted the State's theory, testified that the cocaine studies the State's experts relied on were outdated, and ruled on cocaine as a cause of death. The second ruled out other causes, but could not rule out cocaine, which the State argued effectively supported the State's theory. The first trial resulted in a mistrial due to jury misconduct after seven hours of deliberations. In the second trial, the same defense counsel did not call the first defense expert because he was unavailable and recalled only the second that supported the State's theory, which resulted in conviction after only thirty minutes of deliberations. Counsel was ineffective both in calling the defense expert that undermined the defense and in failing to call the same (by obtaining a continuance or videotaped testimony) or a different available (and local) expert that supported the defense theory. Counsel was also ineffective in failing to investigate and present the medical evidence that contradicted the State's experts' testimony on the link between cocaine and stillbirth and failing to challenge the State's evidence. Counsel was also ineffective in failing to object to improper instructions that confused the measure of intent required for homicide by child abuse. The court initially charged the required "extreme indifference to human life" and then gave a general charge of criminal intent. *Id.* at 361. While this was proper, in response to a jury question on intent, the court repeated only the general charge which confused the issue further and resulted in conviction only five minutes later. Finally, counsel was ineffective in failing to introduce the autopsy report into evidence simply because counsel "just forgot" when the report contradicted the State's

theory of the case. *Id.* at 365. Prejudice was found individually on each of these issues.

Ard v. Catoe, 642 S.E.2d 590 (S.C. 2007). Counsel found ineffective in capital case for failing to adequately develop and present gunshot residue evidence. The defendant was charged with killing his pregnant girlfriend, which resulted in the viable fetus dying from a lack of oxygen. The defense theory and the defendant's testimony was that his girlfriend was holding a gun during an argument and that it fired when he grabbed it to take it away from her. The state examiner issued a report that there was no gunshot residue on the victim's hands but testified that "several particles [] were very interesting, but there was not any or enough material for us to be able to call gunshot residue . . . ." *Id.* at 592 (quoting a statement from SLED agent Joseph Powell). Citing to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty cases, the court held that counsel's conduct was deficient in failing to interview the state examiner or to cross-examine him on this point. Counsel's conduct was also deficient because the expert they retained had been the state expert's supervisor at the time the test was done and he reviewed and approved the report. This expert was not an "independent expert" because casting down on the state examiner's findings would have implicitly cast doubt on his own oversight of the analysis. *Id.* at 597. Counsel's actions "were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense to the guilt phase." *Id.* at 599. Prejudice was found because interviewing or cross-examining the state expert and hiring an independent expert would have revealed that, although the tests were not conclusive for gun powder, the "interesting" particles contained the three required elements of gunshot residue and the particles were "consistent with gunshot residue and could have come from her handling a weapon." *Id.* at 595. Prejudice was also established because the defense's critical theory relied on this evidence and the state capitalized in argument on the lack of gunshot residue evidence and even called the "defense expert" to testify that he agreed with that finding and that he had been hired by the defense. Finally, the court noted that "the jury apparently did not believe this to be an open-and-shut case of

murder," because the jury sought additional instructions on involuntary manslaughter during deliberations. *Id.* at 598.

Nance v. Ozmint, 626 S.E.2d 878 (S.C. 2006). On remand from the U.S. Supreme Court for consideration under *Florida v. Nixon*, 543 U.S. 175 (2004), the court reinstated its opinion finding that trial counsel's failure to investigate, plan, and present a defense in this capital trial constituted "a classic example of a complete breakdown in the adversarial process." Prejudice was presumed for eight reasons: (1) Lead counsel was suffering from numerous health problems, including alcoholism, and was taking numerous medications that impaired his memory and caused other problems, and Co-counsel had been practicing law for only eighteen months; (2) Counsel sought to show that the defendant was mentally ill and wanted the jury to view him in his unmedicated state and successfully got the judge to order such, but then failed to inform the jail personnel of the court's order so the jury saw "a drug-influenced demeanor" during trial; (3) Counsel pronounced in opening statements that they were appointed and neither of them "wanted to be there"; (4) Counsel presented a defense of guilty but mentally ill and failed to qualify their only expert and presented supporting testimony of the defendant's sister only after the expert testified denying him the opportunity to inform the jury of how the sister's testimony supported a finding of mental illness; (5) Counsel presented no evidence of adaptability to confinement in sentencing when they had presented the only bad incident of urine-throwing in confinement during the trial. Evidence was available to establish that the defendant had been selected as an institution's inmate of the year and nominated for the entire state's inmate of the year and testimony was available from a jail administrator and prison minister that the defendant was a "model inmate"; (6) Counsel presented "no mitigating social history evidence," even though the evidence would have established physical abuse throughout the defendant's childhood, an alcoholic, abusive father; being "treated with alcohol as a child in lieu of over-the-counter medication"; and growing up "in a family of extreme poverty and physical deprivation"; (7) "[D]efense counsel's seven-minute mitigation presentation failed to provide the jury with *any* insight concerning Petitioner's mental illness," even though he

has a family history of schizophrenia, history of hearing voices, and suffered from neurological damage; (8) In closing arguments in sentencing, counsel "failed to plead for Petitioner's life and referred to him as a 'sick' man." *Id.* at 878, 882–83.

> [C]ounsel abandoned his role as defense counsel and in fact helped bolster the case against his client . . . .
>
> We again recognize that this type of "consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for '[defense] counsel's ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.'"

Id. at 883 (quoting *Nance v. Frederick*, 596 S.E.2d 62, 67 (S.C. 2004)).

Ingle v. State, 560 S.E.2d 401 (S.C. 2002). Counsel ineffective in criminal sexual conduct and lewd acts case for several reasons. Defendant was charged with assaulting the daughter of his live-in girlfriend. He testified that the semen on her shorts was a result of her sitting on the bed shortly after he and his girlfriend had sex. Defense counsel, without interviewing the girlfriend, called her as a defense witness. She denied having sex with the defendant that morning. Counsel's conduct in relying on the defendant's belief that she would admit the intercourse and the State's failure to call her in the case in chief was unreasonable. Defendant was prejudiced despite the State's recall of the girlfriend in rebuttal because the prejudice of this testimony was heightened because "it came in as part of what was supposed to be petitioner's defense." *Id.* at 403. Counsel also elicited hearsay evidence of the alleged victim's identification of the defendant from the State's expert on child abuse and failed to object to hearsay of the child's identification of the defendant to a police officer. This testimony was prejudicial because it was inadmissible corroboration and there was other evidence that called the victim's credibility in question. Despite the cumulativeness of the identification testimony, it was prejudicial because it corroborated the victim's testimony.

Dove v. State, 523 S.E.2d 459 (S.C. 1999). Counsel found ineffective in murder case for failing to obtain victim's medical

and psychiatric records. She was found dead in a hotel room where she had spent a few nights with her estranged husband after they had an argument. The defendant maintained that she had killed herself, and the defense counsel was informed that the victim had psychiatric treatment recently. The records revealed that she had been committed twice in the preceding three months for substance abuse and depression and that she was suicidal. Prejudice was found because the records could have been used to impeach the victim's mother who denied that her daughter was suicidal and could have created doubt where the evidence of murder was all circumstantial and the physical evidence was just as consistent with suicide as it was murder.

Hicks v. State, 443 S.E.2d 907 (S.C. 1994). Where defendant was charged with selling stolen goods and the evidence implied that her boyfriend and son were in jail for the burglary of the goods sold, trial counsel was ineffective for failing to introduce evidence that defendant's boyfriend and son were in jail on charges unrelated to the burglary of the goods the defendant was charged with selling.

Cobbs v. State, 408 S.E.2d 223 (S.C. 1991). Trial counsel found ineffective for failing to investigate possible defenses when an investigation would have revealed that the prosecuting witness (forgery charge) wanted the charges to be dropped and the defendant had already been convicted in magistrate court for the same burglary.

Martinez v. State, 403 S.E.2d 113 (S.C. 1991). Ineffective trial counsel in criminal sexual conduct case for failing to subpoena witness who would have testified that he saw the defendant leaving a lounge three blocks from the victim's home at 1:45 a.m. when the victim testified that she was raped at her home and then she went to her sister's, arriving between 2:00 and 2:15 a.m.

Grier v. State, 384 S.E.2d 722 (S.C. 1989). Counsel found ineffective in armed robbery case for failing to call alibi witnesses who would have testified concerning an alibi and the fact that defendant was wearing a different color of clothes than victim alleged on the night in question. Defendant and two alibi witnesses did testify, but there were a number of others available.

Frett v. State, 378 S.E.2d 249 (S.C. 1988). Trial counsel found ineffective for failing to request preliminary hearing, not knowing ahead of time when the trial was scheduled, failing to interview or call defense witnesses, not being aware of all the pending charges, failing to move to require the State to elect, and sleeping during trial. Court held that, although normally a defendant must prove actual prejudice, "such a showing may be exempted where counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary." *Id.* at 251.

B. One Deficiency

1. Indictment

Padgett v. State, 484 S.E.2d 101 (S.C. 1997). Trial counsel found ineffective for failing to object to first-degree burglary indictment which alleged burglary of dwelling, but the evidence revealed that the only building on the property was a barn in which no one lived.

Hopkins v. State, 451 S.E.2d 389 (S.C. 1994) *overruled by* State v. Gentry, 610 S.E.2d 494, 501 (S.C. 2005) ("to the extent [the decision] combine[s] the concept of the sufficiency of an indictment and the concept of subject matter jurisdiction"). Trial counsel found ineffective for failing to object to amendment of indictment which changed offenses from DUI causing great bodily injury to DUI causing death and thereby raised maximum punishment from ten to twenty-five years. The amendment deprived the court of jurisdiction to accept guilty plea.

2. Motions and Notice

Morris v. State, 639 S.E.2d 53 (S.C. 2006). Counsel found ineffective in assault and battery with intent to kill trial for failing to request a continuance, which resulted in the defendant being tried in absentia. The defendant showed up on the scheduled trial date, signed a sentencing sheet in anticipation of entering a guilty plea to the lesser-included charge of assault and battery of a high and aggravated nature, and then left the courthouse. He could not be located when his case was called so

he was tried in absentia. Counsel's conduct was deficient because she objected to trial in absentia, but failed to move for a continuance in order to enter the guilty plea agreed to with the State. Prejudice found because the refusal of a continuance would have amounted to an abuse of discretion where assault and battery of high and aggravated nature, the crime the defendant agreed to plead guilty too, is a common law misdemeanor punishable by up to ten years in prison, while assault and battery with intent to kill, for which he was tried and convicted, is a violent crime felony punishable by up to twenty years in prison.

Sikes v. State, 448 S.E.2d 560 (S.C. 1994). Trial counsel found ineffective for failing to raise a meritorious Fourth Amendment claim that defendant was improperly detained where the only evidence of defendant's guilt was discovered as a result of the unlawful detention.

Dupree v. State, 408 S.E.2d 215 (S.C. 1991). Trial counsel found ineffective for failing to pursue at suppression hearing the issue of whether police sergeant's alleged threats rendered the defendant's statement involuntary when there is a reasonable probability that the judge would have suppressed the statement which contained the only evidence of guilty knowledge in the trial for receiving stolen goods.

3. Prosecution Evidence or Argument

Holman v. State, 674 S.E.2d 171 (S.C. 2009). Trial counsel found ineffective in a case involving multiple charges arising from a shooting incident due to counsel's failure to object to the admission of a handgun found in defendant's apartment that had no relevance to the offenses for which the defendant was charged. "[T]he failure to object to this clearly inadmissible evidence was ineffective assistance of counsel" not explained by a valid trial strategy. *Id.* at 172. Prejudice established.

Miller v. State, 665 S.E.2d 596 (S.C. 2008). Counsel found ineffective in armed robbery case for failing to cross-examine the defendant's girlfriend, a State witness, regarding the similarities of three armed robberies in which she and the defendant's nephew were charged. Specifically, the girlfriend's car was used

in each robbery, a similar handgun was used, and the victim's description of the assailant more closely matched the nephew than the defendant. Prejudice established because the defense argued mistaken identity and third-party guilt, which was the primary defense. In addition, the girlfriend's credibility was "questionable at best," because she had initially implicated the defendant in an armed robbery, in which she and the nephew were charged, before she learned he could not have committed the crime because he was in jail at the time. *Id.* at 600.

Roberts v. State, 602 S.E.2d 768 (S.C. 2004). Counsel found ineffective in murder case for failing to adequately impeach a jailhouse snitch, who testified that he was ten feet away in the cell next to the defendant in pretrial confinement and the defendant confessed to him. While counsel discussed with the defendant that the conversation was impossible due to the layout of the cells, counsel did not question the snitch about this or present any evidence on the issue. Counsel's conduct was deficient because, if counsel had adequately prepared and presented the evidence, the evidence would have established that the snitch's cell was 35 to 100 feet from the defendant and the cell block was extremely noisy. Any conversation between the snitch and the defendant would have been heard by numerous guards and inmates, because the defendant would have had to yell to be heard over the noise. Although a "close case," prejudice was found because the snitch was a key witness, and the State's remaining evidence consisted almost entirely of testimony of a codefendant who had made four contradictory statements, including implicating a clearly innocent man in three of those statements. *Id.* at 771. The jury had also asked "who was on trial" during deliberations. *Id.* at 772.

Vaughn v. State, 607 S.E.2d 72 (S.C. 2004). Counsel found ineffective in drug case for failing to object to the prosecutor's closing argument stating what uncalled witnesses would have testified to. The State presented only the testimony of the arresting officer to support a finding that the defendant possessed drugs. In response to defense counsel's argument that there had been another officer in the car at the scene who did not testify, the prosecutor argued that the other officer would have testified consistently if called to testify. Although the prosecutor

was entitled to "some response" to the defense argument, the prosecutor's argument was unfair. Prejudice was found because the State's evidence was limited to the arresting officer. Moreover, during deliberations, the jury asked to see the "testimony" of the officer who was not called to testify.

Sanchez v. State, 569 S.E.2d 363 (S.C. 2002). Counsel found ineffective in criminal sexual conduct with a minor case for failing to object to hearsay testimony. The six year old alleged victim testified about the alleged assault. Her mother and father also testified and included hearsay statements from the victim concerning details of the assault and the identity of the perpetrator. Counsel testified that he did not object to this hearsay because it did not alter the victim's testimony and that some of the statements where different. Counsel's conduct was deficient because, while limited corroborative testimony is allowed in criminal sexual conduct cases, the corroborative evidence is limited to the time and place of the assault and cannot include details or particulars or the identity of the perpetrator. Thus, the mother's and father's testimony was clearly inadmissable. Prejudice was found because improper corroboration testimony that is cumulative to the victims testimony cannot be harmless. "[I]t is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Id.* at 365. Counsel's conduct was also deficient in failing to object to the testimony of a police officer concerning the alleged victim's statement and actions with anatomically correct dolls. Counsel's alleged strategy to allow this testimony was to show that the victim's statements were vague. "Because the officer's testimony regarding the dolls corroborated the victim's testimony at trial, counsel's strategy was not reasonable given the prejudicial effect this testimony had . . . ." *Id.* at 366.

Matthews v. State, 565 S.E.2d 766 (S.C. 2002). Counsel found ineffective for failing to object to prosecutor vouching for the credibility of a State witness in her argument. Counsel agreed remarks were improper but did not object because he did not want judge to admonish him for objecting during argument or give the State additional time to argue (both of which had already happened). Counsel's reasons for failing to object were found insufficient because "counsel cannot assert trial strategy as

a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Id.* at 768. Prejudice also found because this was a mass drug conspiracy trial with numerous witnesses where the State's evidence was pretty much all people "higher" in the conspiracy testifying for reduced sentences.

Gilchrist v. State, 565 S.E.2d 281 (S.C. 2002). Counsel found ineffective in attempted common law robbery case due to counsel's failure to object to prosecutor's improper vouching for witness's credibility in opening statements. The prosecutor essentially gave personal assurance of the witness's veracity in "religiously-tinged language." *Id.* at 285. Prejudice found because the witness at issue was the State's key witness and his credibility was crucial to the State's case.

Dawkins v. State, 551 S.E.2d 260 (S.C. 2001). Counsel found ineffective in criminal sexual conduct case for failing to object to the hearsay testimony of four witnesses that the alleged victim told them the identity of the perpetrator. While limited hearsay corroborative testimony is allowed in sexual assault cases, this corroboration is limited to the time and place of the assault and cannot include details or particulars, such as identification of the perpetrator. The defendant was prejudiced because improper corroboration that is merely cumulative to the victim's testimony cannot be harmless. Moreover, where the alleged victim's credibility was the central issue at trial, counsel's ineffectiveness could not be excused by a strategy to avoid upsetting or confusing the jury, especially since this issue could have been litigated outside the presence of the jury.

McFadden v. State, 539 S.E.2d 391 (S.C. 2000). Counsel found ineffective in drug case for failing to object to prosecutor's argument that he only had one closing because the defense presented no evidence,[1] which was essentially a comment on defendant's right to silence. Defendant was prejudiced by this single reference because his exculpatory story was not totally implausible, the evidence of guilt was not overwhelming, and the

1. Under state law, the defendant was entitled to the final closing argument only if he presented no evidence in defense. Otherwise, the state was entitled to open and close.

trial court's general charge on defendant's right not to testify did not cover this situation. Counsel also ineffective for failing to object to the prosecutor's argument that the jury could infer guilt because the defendant left after jury selection and was tried in absentia, and for failing to request an instruction provided by state law that the jury could not infer guilt from the defendant's absence.

Edmond v. State, 534 S.E.2d 682 (S.C. 2000). Counsel found ineffective in burglary and grand larceny case for failing to object to detective's testimony and prosecutor's comments regarding petitioner's invocation of his rights to counsel and to remain silent, as jurors may have used testimony and comments to infer petitioner was guilty simply because he exercised his rights, and circumstantial evidence of petitioner's guilt was not overwhelming.

Green v. State, 527 S.E.2d 98 (S.C. 2000). Counsel found ineffective in distribution of crack cocaine case for failing to object that the probative value of two prior possession of cocaine charges used to impeach the defendant was outweighed by the prejudice. Defendant was arrested in an undercover sting operation but the evidence essentially was a match of credibility between the defendant's testimony and that of the officers. Prejudice found because of the limited impeachment value of the prior offenses, the remoteness of the prior convictions, the similarity between the past crimes and the charged crime, the importance of the defendant's testimony, and the centrality of the credibility issue in this case.

Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999). Trial counsel found ineffective for failing to object when the solicitor cross-examined the defendant at the guilt or innocence phase of trial by reading back to him his answers to true-false questions that were part of an MMPI-A (a standardized psychological test) administered as part of a pretrial competency evaluation at the state hospital. The cross-examination was intended to impeach the defendant's character for truthfulness where he initially said he was the shooter but then testified at trial that his co-defendant was the shooter, and he had told the police otherwise only because the codefendant was like a brother, and he thought if he accepted responsibility the State would be more lenient with

him since he was only seventeen and his codefendant was eighteen. While the court found no constitutional violation, the court held that the State's use of test materials, derived from a pretrial competency evaluation to assist in winning a conviction, violated *State v. Myers*, 67 S.E.2d 506 (S.C. 1951), which precludes use of information gathered during court-ordered examination except for purposes ordered by the court. The failure to prevent this cross-examination was prejudicial both because of the importance of the defendant's credibility given the facts of the case, codefendant said he was the shooter and he testified that codefendant was the shooter, and because defense counsel's attempt to explain away the test results led them to call a psychiatrist who made damaging and otherwise inadmissible statements (in the trial phase) about the defendant's antisocial character on cross-examination.

Simmons v. State, 503 S.E.2d 164 (S.C. 1998). Counsel found ineffective in burglary case for failing to object to improper argument by solicitor concerning the meaning of a life sentence. Under state law, jury in burglary case could find guilty (which meant, at the time, a mandatory life sentence) or guilty with a recommendation of mercy (which allowed judge to give a lesser sentence).[2] The prosecutor's argument that a life sentence "is not the entire natural life of a person" injected the issue of parole into the proceedings. *Id.* at 165. Likewise, the prosecutor's argument equated to a recommendation of mercy with a much lighter sentence or an acquittal. The trial court instructed the jury that the court would sentence the defendant but gave no instruction which cured the errors.

German v. State, 478 S.E.2d 687 (S.C. 1996). Counsel found ineffective in possession with intent to distribute crack case for failing to object to prosecutor's argument and police officer's testimony that police had received several tips that the defendant was distributing or selling crack cocaine, as this evidence was inadmissible as a comment on defendant's character.

Fossick v. State, 453 S.E.2d 899 (S.C. 1995). Counsel found

2. South Carolina abolished the "recommendation of mercy" verdict and the mandatory life sentence in 1997.

ineffective for failing to object to prosecutor's closing argument on guilt that the defendant showed no remorse.

Mincey v. State, 444 S.E.2d 510 (S.C. 1994). Trial counsel found ineffective for failing to object to prosecutor's suggestions during closing argument that defense witnesses testified falsely due to intimidation by the defendant when there was no evidence of intimidation.

Jolly v. State, 443 S.E.2d 566 (S.C. 1994). Trial counsel found ineffective in criminal sexual conduct case for failing to object to witness's hearsay testimony that the alleged victim told the witness that the defendant had sexually assaulted her.

Simmons v. State, 419 S.E.2d 225 (S.C. 1992). Trial counsel found ineffective in narcotics case for failing to object to solicitor's cross-examination and jury argument concerning defendant's refusal to allow warrantless search of his vehicle.

Mitchell v. State, 379 S.E.2d 123 (S.C. 1989). Trial counsel in murder case ineffective for failing to object to inadmissible evidence of defendant's devil worship and mafia membership which tended to prove only that defendant was a bad person with a propensity to commit crime.

4. Impeaching Witness

Pauling v. State, 503 S.E.2d 468 (S.C. 1998). Counsel found ineffective in burglary and criminal sexual conduct case for failing to call triage nurse as witness. Victim testified that she was penetrated. Doctor testified that there was no physical evidence of penetration, but that victim "had told her the assailant did not enter all the way." *Id.* at 470. Triage nurse's notes showed that victim told her there was no penetration. Although triage nurse did not have any independent recollection, the notes could have been used to refresh her recollection. The court noted in finding prejudice: "Even defense counsel admitted the nurse's testimony was critical." *Id.* at 471 (citing *Martinez v. State*, 403 S.E.2d 113 (1991) (standing for the proposition that where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance)).

Thomas v. State, 417 S.E.2d 531 (S.C. 1992). In rape case

where the victim was the sole witness and she identified the defendant as her attacker, trial counsel was ineffective for failing to call emergency medical personnel who would have testified that the victim stated immediately after the attack that she did not know her assailant.

5. Eliciting Damaging Evidence and Making Damaging Argument

Caprood v. State, 525 S.E.2d 514 (S.C. 2000). Counsel found ineffective in armed robbery case for eliciting hearsay from officer about the defendant's "rap sheet" and "some type of violation." *Id.* at 518 (internal quotation marks omitted). Trial court had found ineffective and granted relief on a number of bases. Supreme Court reversed on all issues but this one because the State had not appealed on this issue and the trial court's ruling was thus the law of the case.

6. Instructions

Tisdale v. State, 662 S.E.2d 410 (S.C. 2008). Counsel found ineffective in murder case for failing to request charges on involuntary manslaughter and accident. Counsel's conduct was deficient because the defendant's testimony supported an involuntary manslaughter charge by providing evidence of a struggle over a weapon and supported an accident charge because of an accidental discharge of a gun with the defendant lawfully armed for self-defense.

Lowry v. State, 657 S.E.2d 760 (S.C. 2008). Counsel found ineffective in murder case for failing to object to a burden-shifting instruction on malice. The court initially gave proper instructions but because of the State's concern that the court had failed to instruct on felony murder, the court gave a supplemental instruction. While the initial charge contained permissive language allowing the inference of malice from participation in a felony, the supplemental charge created a presumption of malice from participation in a felony and shifted the burden of proof to the defendant. This charge was improper, was not alleviated by the early proper charge, and was especially problematic as "the last thing the jurors heard before beginning

deliberations." *Id.* at 764. Counsel's conduct was deficient in failing to object. Prejudice was also established because the error was not "harmless [beyond a reasonable doubt]." *Id.* There was "little direct probative evidence of malice" in the defendant's statements, and other evidence was questionable or minimal such that "the only undisputed relevant facts . . . are that Petitioner was near the scene of the crime at the time it occurred, but was neither the gunman, nor in the getaway car." *Id.* at 766.

Dawson v. State, 572 S.E.2d 445 (S.C. 2002). Counsel found ineffective for failing to object to a coercive *Allen* charge. During deliberations the jury foreman informed the court that the jury was split 11 to 1 and that he did not know whether the jury could reach a unanimous verdict. The court asked the foreman to consult with the other jurors to see if a consensus could be reached and then asked the foreman if the numerical split was the same. The court then gave an *Allen* charge, which could be perceived as being directed toward the minority juror. The charge was coercive, especially in light of the judge's knowledge that there was only one holdout juror. The court also erred in not instructing the jury not to state its numerical division and also inquiring as to the jury's continued numerical division.

Tate v. State, 570 S.E.2d 522 (S.C. 2002). Counsel found ineffective in murder and assault case for failing to object to jury instructions that unconstitutionally shifted the burden of proof to the defendant by stating that malice was presumed from the use of a deadly weapon. Counsel's conduct was deficient in failing to object to the presumption of malice charge where counsel's sole objection was that the charges were given undue emphasis because the charge was first given as a supplemental charge at the solicitor's request after the jury had been sent out. The charge was given twice more in response to jury questions during deliberations without additional objection from counsel other than the undue emphasis. The court found no prejudice with respect to the murder conviction because malice was clear on that charge and the erroneous instructions would not have contributed to the jury's findings. Prejudice, however, was found with respect to the assault and battery with intent to kill conviction because though there was a reasonable probability

that the erroneous charges affected the jury's consideration in deciding guilt on this charge or the lesser included charge of assault and battery of a high and aggravated nature, which did not require a finding of malice. Prejudice found because the evidence of malice on this charge was not overwhelming. Finally, the trial court's proper instruction in conclusion of an inference of malice that was not binding on the jury did not cure the prejudice. This instruction was not given immediately following the malice charges and "was given only once, whereas the erroneous presumption of malice charge was repeated three times." *Id.* at 528.

Pauling v. State, 565 S.E.2d 769 (S.C. 2002). Counsel found ineffective in case involving two murder charges and numerous other charges. The defense contested only the murder charges. After the jury indicated that it was hung only on the murder charges and inquired whether failure to agree would require a complete new trial or only a new trial on the murder charges, the court, without objection, instructed the jury that failure to agree would require a new trial on all issues. Counsel found ineffective for failing to object because the court's instruction was wrong. Failure to reach agreement on the murder charges would not result in mistrial on charges where the jury did reach a verdict. Where State's theory was accomplice liability, prejudice found because jury, following the erroneous instruction, convicted defendant on one murder charge and acquitted on the other charge even though there was no evidence in the record distinguishing the two defendants' conduct such to convict one and not the other.

Brightman v. State, 520 S.E.2d 614 (S.C. 1999). Counsel found ineffective for failing to request a specific charge required by state law (but no longer after this opinion) that informs the jury that any reasonable doubt between lesser and greater offenses must be resolved in the defendant's favor.

Brunson v. State, 477 S.E.2d 711 (S.C. 1996). Counsel found ineffective in possession with intent to distribute crack case for failing to request a mere presence charge when the evidence revealed that the drugs seized were not found on either of the two co-defendants who were tried jointly.

Roseboro v. State, 454 S.E.2d 312 (S.C. 1995). Counsel

found ineffective for failing to request alibi charge in criminal sexual conduct case when State's case was circumstantial, alibi witnesses testified, and prosecutor disparaged alibi during closing argument. Strategic decision was unreasonable.

Chalk v. State, 437 S.E.2d 19 (S.C. 1994), *overruled by* Brightman v. State, 520 S.E.2d 614, 616 n.5 (S.C. 1999). Trial counsel found ineffective for failing to request an instruction to resolve any reasonable doubt as to whether defendant was guilty of murder or manslaughter in favor of the lesser included offense.

Taylor v. State, 439 S.E.2d 820 (S.C. 1993). Trial counsel found ineffective for failing to object to burden shifting instruction on issue of intent to distribute controlled substances.

Riddle v. State, 418 S.E.2d 308 (S.C. 1992). Trial counsel found ineffective for failing to request an alibi instruction when the sole theory of defense was alibi.

Gallman v. State, 414 S.E.2d 780 (S.C. 1992). Trial counsel found ineffective for failing to object to judge's comment prior to closing arguments and instructions that jurors were free to talk about the case among themselves.

Battle v. State, 409 S.E.2d 400 (S.C. 1991). Trial counsel found ineffective for failing to request specific instructions on appearances to defendant and retreat as it related to self-defense.

Carter v. State, 392 S.E.2d 184 (S.C. 1990), *overruled in part by* Brightman v. State, 520 S.E.2d 614, 616 n.5 (S.C. 1999). Trial counsel found ineffective in murder/manslaughter case for failing to object to instruction which created a mandatory presumption of malice (rather than allowing a permissive inference) and precluded a finding of manslaughter. Trial counsel also found ineffective for failing to request the required instruction that the jury had a duty to resolve doubt as to level of guilt in defendant's favor and find him guilty only of the lesser offense.

Dandy v. State, 391 S.E.2d 581 (S.C. 1990). Counsel found ineffective for failing to object to a self-defense charge which erroneously stated that defendant must prove self-defense by a preponderance of the evidence.

High v. State, 386 S.E.2d 463 (S.C. 1989). Counsel found

ineffective for failing to object when the judge, during a manslaughter charge, instructed that the law presumes intent from the doing of an unlawful act.

Stone v. State, 363 S.E.2d 903 (S.C. 1988). Trial counsel found ineffective for failing to request a self-defense instruction when the facts of the case clearly supported such an instruction.

Sosebee v. Leeke, 362 S.E.2d 22 (S.C. 1987). Trial counsel in criminal sexual conduct case found ineffective for failing to object to judge's improper comments in the presence of the jury which clearly reflected that the judge believed the victim's testimony.

7. Failure to Challenge Competence

Matthews v. State, 596 S.E.2d 49 (S.C. 2004). Counsel found ineffective in an armed robbery, car jacking, and accessory after the fact to murder plea for failing to request a competence hearing prior to the defendant's plea. The defendant had learning disabilities and took special education classes in school. Just one year before the crimes, the defendant had been in a near fatal car accident that caused significant neurological damage to his frontal lobe.

8. Miscellaneous

Wertz v. State, 562 S.E.2d 654 (2002). Counsel found ineffective in a second degree burglary case for failing to request clarification of the jury's verdict with respect to the degree of the burglary conviction where the jury acquitted the defendant of possession of a firearm during the commission of a violent offense but convicted him on second degree burglary, which required a finding that the defendant was armed. Prejudice was found because the jury was not instructed to specify the degree of burglary found or that a general verdict had the effect of finding petitioner guilty of the offense charged in the indictment.

Patrick v. State, 562 S.E.2d 609 (S.C. 2002). Counsel found ineffective in burglary case for failing to request mercy from jury. Under state law at the time, a jury in a burglary case could find guilty (which meant, at the time, a mandatory life sentence) or guilty with a recommendation of mercy (which allowed a judge to

give a lesser sentence of as little as five years).[3] The court held "failure to argue mercy is *per se* prejudicial." *Id.* at 613.

Banshee v. State, 418 S.E.2d 313 (S.C. 1992) (per curiam). Trial counsel found ineffective for *successfully* moving for dismissal of a nonviolent charge of receiving stolen goods thereby leaving the jury with the extreme alternatives of convicting the defendant of violent offenses (armed robbery, kidnapping, conspiracy, and possession of a sawed-off shotgun) or acquitting him.

II. CAPITAL SENTENCING PHASE ERRORS

A. Numerous Deficiencies and Inadequate Mitigation

Rosemond v. Catoe, 680 S.E.2d 5 (S.C. 2009). Counsel found ineffective in capital sentencing for failing to present evidence of the defendant's mental illness. There was no need to "speculate about the mitigation evidence known by trial counsel as the evidence was presented during pretrial competency hearings." *Id.* at 9. Specifically, two defense experts testified that the defendant was "clearly paranoid" and suffered either from a delusional disorder or schizophrenia but a diagnosis could not be made because the defendant was evasive and guarded even with the experts. *Id.* A court-appointed examiner was also willing to testify that the defendant might be in the early stages of schizophrenia. Trial counsel did not present this evidence in sentencing because he "mistakenly believed" that the trial court's finding of competence to stand trial "precluded him from presenting . . . mental health mitigation evidence in the sentencing phase. Counsel's erroneous belief clearly constituted deficient representation." *Id.* at 8–9. Prejudice was also established because counsel only presented a few family members and friends to portray the defendant as a good boy, and a mental health expert gave "conclusory" testimony that the defendant "could adjust to prison." *Id.* at 10. The expert conceded on cross, however, that he had not diagnosed a mental

3. South Carolina abolished the "recommendation of mercy" verdict and the mandatory life sentence in 1997.

illness. In short, "the theme of the evidence was the absence of any mental health concerns." *Id.* Even with only this evidence, the jury deliberated for more than eleven hours over two days and received an *Allen* charge before reaching its death verdict. "Given the jury's struggle during the sentencing phase and the want of any mental health mitigation evidence," prejudice was found. *Id.*

Council v. State, 670 S.E.2d 356 (S.C. 2008). Counsel found ineffective in capital sentencing for failing to adequately investigate and present mitigation. Defense counsel asserted during trial and sentencing that the defendant was "merely present at the time" of the crimes, which were committed by another man. *Id.* at 358. The only mitigation evidence presented was "extremely limited testimony" of the defendant's mother. *Id.* at 364. Counsel's conduct was deficient, as follows:

> Initially, trial counsel was deficient in not beginning his investigation into [the defendant's] background once the State served its notice of intent to seek the death penalty, counsel discovered that [the defendant's] DNA was found at the scene of the crime, and counsel learned of Respondent's inculpatory statements to police indicating that he sexually assaulted the victim. Clearly counsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence.

Id. at 363. Nonetheless, counsel sought only limited records prior to trial, did not request other records until the day jury selection began, did not have the defendant examined by a defense psychiatrist "until one month before trial," and provided the defense psychiatrist "with only limited records." *Id.* "As in *Wiggins*, counsel[']s conduct fell below the standards set by the ABA." *Id.* (citing American Bar Association 11.4.1(2)(C) (1989) (Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases)). "Even the limited information obtained should have put counsel on notice that [the defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence. *Id.* (internal citations omitted). "[N]ot only did counsel delay in investigating [the defendant's] background, he failed to conduct an adequate investigation.

Significantly, [counsel] failed to provide his only expert witness . . . with sufficient records and only directed him to evaluate . . . competency to stand trial and criminal responsibility." *Id.* The expert, "at the direction of counsel" also "only met with [the defendant] on two occasions, the first being shortly before trial." *Id.*

> Furthermore, even though the funding was available, trial counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However, neither of these individuals was qualified in terms of social work experience, to evaluate the information to assess [the defendant's] background.
>
> Finally, we believe it was unreasonable for trial counsel not to obtain . . . family records. First, it is inexplicable that trial counsel deemed these records unimportant because they did not directly involve [the defendant]. . . . secondly, even counsel[']s brief interviews with . . . family members and the DJJ records should have alerted him to the fact that the family was dysfunctional, [the defendant] had been raised in a violent home environment, and experienced learning disabilities. All of these factors constituted mitigating evidence and warranted further investigation.

Id. at 363–64 (internal citations omitted). "Even if trial counsel[']s investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence." *Id.* at 364. Counsel's conduct was not excused by strategy because:

> [S]trategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation. Secondly, counsel was already aware the jury had rejected the defense theory that [the defendant] was not the actual perpetrator but was merely present. . . . Thirdly, it would not have been inconsistent for trial counsel . . . to present the accomplice theory during the guilt phase but mitigation evidence in the penalty phase. . . . Finally, given the State had already presented damaging character evidence, we do not believe [the defendant's] character could have been

> damaged any further by the presentation of additional mitigating evidence. Trial counsel essentially would have had "nothing to lose" and "everything to gain" by presenting this evidence.

Id. at 364–65. (internal quotation marks and citations omitted). Prejudice found despite "overwhelming" evidence of guilt and the jury's finding of six aggravating factors because the jury did not hear "very strong mitigating evidence," including: (1) "medical evidence or other testimony describing mental health issues or that several of his immediate family members suffered from mental illness," such as "schizophrenia, schizoid, bipolar disorder, depression, and borderline personality disorder"; (2) alcoholic father and parents' divorce on the basis of physical cruelty; (3) "bad neighborhoods" and extreme poverty; (4) a significant drop in I.Q. between the ages of seven and ten "which may have been the result of a head injury or the onset of mental illness"; (5) "began getting into trouble at the age of ten years most likely as the result of his violent family environment and negative influence of his siblings"; (6) alcohol and drug use beginning at age sixteen; (7) attempted suicide in his twenties; (8) "a borderline I.Q. and frontal lobe brain dysfunction"; and (9) "the onset of . . . schizophrenia [which is undisputed now and has rendered the defendant incompetent since at least 2001] may have begun in early adolescence or childhood." *Id.* at 365. The court concluded: "We cannot say [beyond a reasonable doubt] that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence for [the defendant]." *Id.* at 366 n.7.

Von Dohlen v. State, 602 S.E.2d 738 (S.C. 2004). Counsel found ineffective in capital sentencing for failing to adequately prepare and present mitigation. Counsel presented evidence that the petitioner was a good husband, a good father, and a dependable employee. He grew up in a poor family and had suffered physical and emotional abuse as a child. He had no prior criminal record. His brother was murdered just two weeks before the crimes and petitioner became withdrawn and depressed and began abusing alcohol and Valium. The "violent murder was completely unexpected and out of character for a man who had never displayed violent tendencies." *Id.* at 741.

During sentencing, counsel presented testimony from a defense psychiatrist that petitioner suffered an "adjustment reaction with mixed features of emotions and conduct," and pathological intoxication of alcohol and Valium abuse. *Id.* The psychiatrist testified, however, that petitioner "did not have a chronic mental illness" and the prosecutor capitalized on this in closing arguments. *Id.* Counsel's conduct was deficient in failing to provide the defense expert with available medical records and testing relating both to the petitioner, as well as his father and brother. Prejudice found because, with the available records, the defense expert would have testified that the petitioner "suffered from severe, chronic depression, a major mental illness," with "psychotic and suicidal tendencies." *Id.* at 742. Counsel's conduct was also deficient in failing to object to the prosecutor's closing argument in sentencing inviting the jurors to put themselves in the "victim's shoes," which was improper under state law and impermissible under *Payne v. Tennessee,* 501 U.S. 808 (1991). *Id.* at 743–44. Prejudice was not, however, established on this issue.

B. One Deficiency

1. State Aggravation Evidence or Argument

Hall v. Catoe, 601 S.E.2d 335 (S.C. 2004). Counsel found ineffective in capital sentencing for failing to object to the prosecutor's closing argument that asked the jury to compare the defendant's worth and the victims' worth in an emotionally inflammatory fashion unrelated to the circumstances of the crime and traditional victim impact evidence.

III. NON-CAPITAL SENTENCING ERRORS

Davis v. State, 520 S.E.2d 801 (S.C. 1999). Counsel found ineffective for failing to object to the trial court's consideration of the defendant's exercise of the right to trial in sentencing the defendant to ten years for distribution of crack. Following the sentencing, counsel moved to reconsider on the basis that several similarly situated defendants got lesser sentences. The court said that the other sentences were lower because the other defendants pled guilty. Because it is an abuse of discretion for

the trial court to consider the defendant's exercise of his right to trial as an aggravating factor, counsel was ineffective for failing to object.

Scott v. State, 513 S.E.2d 100 (S.C. 1999). Counsel found ineffective in this drug trafficking case for failing to object to the court considering a 1987 misdemeanor conviction for simple possession and sentencing the defendant as a second offender under the statute. The 1987 charge was actually a bond forfeiture for failure to appear and not a "conviction" for purposes of sentencing under the drug statute. A bond forfeiture may be considered a "conviction" only when the legislature specifically provides that the two are equivalent. Because the legislature had done so in other contexts, the court inferred the legislature did not intend for a bond forfeiture to be the equivalent of a conviction in this context. The defendant was prejudiced because the maximum sentence for a first offense is ten years and for a second offense thirty years. The defendant was sentenced to thirty years.

Chubb v. State, 401 S.E.2d 159 (S.C. 1991). Trial counsel found ineffective in burglary case, where a burglary conviction mandated a life sentence unless the jury recommended mercy, for failing to present mitigation evidence or argue for mercy during the guilt phase because of her erroneous expectation that a separate sentencing proceeding would be held.

Watson v. State, 338 S.E.2d 636 (S.C. 1985). Trial counsel found ineffective in burglary case, where a burglary conviction mandated a life sentence unless the jury recommended mercy, for failing to advise defendant who pled guilty that he had the right to have a jury impaneled following the guilty plea to consider a recommendation a mercy.

IV. ADVISING CLIENT

A. Guilty Plea After Inadequate Investigation or Research

Berry v. State, 675 S.E.2d 425 (S.C. 2009). Counsel found ineffective in drug case in failing to inform the defendant, who pled guilty to a drug charge, of a potential challenge to the use of his prior conviction for possession of drug paraphernalia for

sentencing enhancement purposes. Counsel's conduct was deficient because "a conviction for possession of drug paraphernalia may not be used for enhancement purposes as it does not 'relate to' drugs as statutorily mandated." *Id.* at 426–27. Nonetheless, counsel did not challenge the State's reliance on the paraphernalia conviction for enhancement purposes or inform the defendant of the potential challenge. Indeed "counsel never gave any thought to the issue." *Id.* at 427. While the validity of the legal challenge may have been "unclear" at the time of the plea, "uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State." *Id.* Counsel's conduct was deficient because "[s]imply saying 'I never gave it a thought' falls short of the Sixth Amendment guarantee of effective assistance of counsel." *Id.* Prejudice was established because the defendant testified in PCR that he would have gone to trial if he had known that his paraphernalia conviction did not qualify as a prior offense for enhancement purposes.

Stevens v. State, 617 S.E.2d 366 (S.C. 2005). Counsel found ineffective in plea to receiving stolen goods case where the defendant was charged and pled to eighteen counts. If counsel had adequately investigated and researched the issue, counsel could have challenged the number of indictments because, under the "plain meaning of the statute," the receipt of multiple items in a single transaction or event constitutes a single offence. *Id.* at 368. Prejudice found because the defendant likely would not have pled guilty to eighteen counts and may well have received a lighter sentence if the court had four or five counts before it rather than eighteen.

B. Erroneous Advice on Sentencing or Collateral Consequences That Leads to Plea

Turner v. State, 517 S.E.2d 442 (S.C. 1999). Counsel found ineffective for failing to adequately advise defendant prior to plea. Defendant entered plea to pending charges after his probation was revoked and he was sentenced to serve the remaining fourteen years on prior charges. He actually only had seven years remaining on the prior charge however and would

not have pled guilty for the fifteen year concurrent sentence if he had known that.

Alexander v. State, 402 S.E.2d 484 (S.C. 1991). Trial counsel found ineffective for advising client that he would face potential life sentence if he proceeded to trial when he would have actually faced a seven to twenty-five year sentence for one charge and a twenty-five year sentence for the second charge. Based on trial counsel's erroneous advice, defendant pled guilty.

Ray v. State, 401 S.E.2d 151 (S.C. 1991). Counsel found ineffective for advising defendant he would get life without parole if convicted which prompted guilty pleas when sentence actually ranged from seventy-five years without parole to as little as ten years if sentences ran concurrently.

Hinson v. State, 377 S.E.2d 338 (S.C. 1989). Trial counsel in murder case found ineffective for advising client that he would be eligible for parole in ten years if he pled guilty when in fact he would not be eligible for parole until twenty years had passed. Defendant pled guilty based on this erroneous advice.

C. Failure to Inform Defendant or State of Plea Offer

Davie v. State, 675 S.E.2d 416 (S.C. 2009). Counsel found ineffective in drug trafficking case for failing to inform the defendant of the State's initial written plea offer in which the State offered a fifteen-year sentence in exchange for a guilty plea. Counsel was unaware of the State's offer until after its expiration because counsel was relocating his office and changing his mailing address. Ultimately, the defendant entered a "straight up" plea to eight charges in return for the State dismissing three charges, and the State recommended life without parole. *Id.* at 419. The defendant was sentenced to twenty-seven years. Even though counsel may not have been aware of the plea offer until after the expiration date, counsel's conduct was deficient in failing to object at the plea hearing to lack of notice of the first offer when it was mentioned by the State. "Had counsel done so, he might have been able to convince the solicitor to reinstate this plea offer or persuade the circuit court judge to impose a fifteen-year sentence." *Id.* at 421. Prejudice established based on the difference in the sentence the defendant received and that offered

by the State initially and the fact that counsel and the defendant testified that he would have accepted the initial plea offer if it had been communicated to him. Remanded for resentencing not to exceed the original twenty-seven year sentence.

D. Other Erroneous Legal Advice Leading to Plea

Jackson v. State, 535 S.E.2d 926 (S.C. 2000). Counsel found ineffective in threatening a public official case for failing to advise the defendant that the crime was a felony. During plea hearing counsel said it was a misdemeanor. Prejudice found because defendant testified he would not have pled *nolo contendere* if he had known it was a felony. Trial judge found this testimony was not credible, but appellate court reversed because regardless of credibility there was no contrary evidence supporting the court's finding that petitioner would have pled guilty anyway.

Murdock v. State, 426 S.E.2d 740 (S.C. 1992). Trial counsel was ineffective for advising defendant to plead guilty to possession of counterfeit substance with intent to distribute when the defendant was actually in possession of an imitation, not counterfeit, substance and possession of an imitation substance with intent to distribute is not a crime.

Shirley v. State, 411 S.E.2d 215 (S.C. 1991). Trial counsel found ineffective for failing to advise defendant, prior to his entry of guilty plea, that his incriminating statements made which were induced by the investigating officer's promise of a four-year sentence cap may have been made involuntarily and, if so, would be inadmissible at trial.

Kerrigan v. State, 406 S.E.2d 160 (S.C. 1991). Trial counsel found ineffective for failing to advise defendant, who continuously declared his intent to return the car, that if he went to trial on grand larceny of automobile charge, he could have requested an instruction on the lesser offense of use of vehicle without permission and might have been convicted of the lesser offense. Without this advice, the defendant pled guilty to the grand larceny charge.

Jivers v. State, 406 S.E.2d 154 (S.C. 1991). Trial counsel found ineffective for advising defendant that the Double

Jeopardy Clause would not bar prosecution on charge of assault and battery which was based on the same conduct which supported a previous conviction for criminal domestic violence. Defendant pled guilty based on this erroneous advice.

Davenport v. State, 389 S.E.2d 649 (S.C. 1990). Counsel found ineffective for "advising [defendant] to plead 'guilty but mentally ill' to murder" despite knowledge that the State's psychiatrist diagnosed defendant as insane at time of offense and counsel failed to discuss insanity with defendant. *Id.* at 649–50.

E. Inadequate Advice on Right to Testify or to Make Closing Argument

Cooper v. Moore, 569 S.E.2d 330 (S.C. 2002). Counsel found ineffective in murder capital case for failing to advise defendant that he had a statutory right to personally address the jury regarding all charges in trial closing argument. Defendant was convicted of murder, kidnapping, armed robbery, and conspiracy to commit armed robbery and was sentenced to death. On direct appeal the court, applying *in favorem vitae* review, found that reversal of the murder conviction was required because the trial court failed to advise the defendant of his right to make a closing argument. Because *in favorem vitae* review (which required a review of the record for error regardless of counsel's failure to object) applied only to murder charges, the court did not address whether the non-capital convictions should also be reversed. In post-conviction relief proceedings, defendant asserted that counsel was ineffective in failing to advise him of his statuary right to make a closing argument on all charges. The court held that S.C. Code section 16-3-28 provides that "in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument." *Id.* at 332 (citing S.C. CODE ANN. § 16-3-28 (1985 & Supp. 2001)). The court held that the plain language of this statute allows the capital defendant to address the jury regarding all charges whether or not all of the charges carry the death penalty. Counsel's conduct was deficient in failing to advise the defendant of his statutory right to make a closing argument during the

trial. Prejudice was found because the defendant had not testified during trial in order to avoid cross-examination with prior conviction. Thus, the jury did not have the opportunity to hear him argue for his innocence or to hear and consider his side of the story. Prejudice found because the evidence against the defendant was mostly circumstantial and not overwhelming. Thus, the defendant's statement could have swayed the jury to find him not guilty on the non-capital charges.

Horton v. State, 411 S.E.2d 223 (S.C. 1991). Trial counsel found ineffective for advising defendant that, if he testified, he could be cross-examined about prior convictions for simple possession of marijuana (not a crime of moral turpitude) and assault and battery with intent to kill (fifteen years previously and defense counsel failed to get a rule from judge concerning remoteness). Defendant did not testify because of this advice.

F. Inadequate Advice on Right to Appeal

Johnson v. State, 480 S.E.2d 733 (S.C. 1997). Trial counsel found ineffective for failing to timely notify defendant of right to appeal so direct appeal issues were reviewed on the merits in PCR appeal.

V. FAILURE TO COMPEL COMPLIANCE WITH PLEA AGREEMENT

Custodio v. State, 644 S.E.2d 36 (S.C. 2007). Counsel found ineffective in burglary and grand larceny case for failing to have the defendant's plea agreement enforced based on detrimental reliance. Shortly after his arrest, the defendant met with police and two assistant prosecutors and was promised a fifteen-year cap if he would cooperate with officers. He did so in admitting to "a string of at least seventy-five burglaries" and assisting in the recovery of a half million dollars worth of property. *Id.* at 37. Following his cooperation, the elected prosecutor chose not to honor the initial agreement, and the defendant pled guilty and was sentenced to forty-five years. Counsel's conduct was deficient in failing to pursue enforcement of the initial agreement, which the defendant told her about, and

the police and the assistant prosecutors confirmed. The lower court's finding that there was no agreement was "without any evidence of probative value" because the defendant and his counsel testified and the State presented no contrary evidence. *Id.* at 38. Thus, "[t]he only evidence presented was that an agreement in fact existed." *Id.* Prejudice established because the defendant was entitled to enforcement of the deal. The State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer. *Id.* at 39. Here, the defendant had detrimentally relied on the offer. Initial plea bargain enforced.

Thompson v. State, 531 S.E.2d 294 (S.C. 2000). Counsel found ineffective following plea to voluntary manslaughter for failing to object to the State's request for the maximum sentence of thirty years in violation of the negotiated plea agreement. State had agreed to make no sentencing recommendation. Court had stated during plea negotiations that it would give a sentence of no less than twenty years but would not give the maximum sentence. State recommended maximum. Defense failed to object and even stated prosecutor had complied with the agreement. Court gave a sentence of twenty-five years. The supreme court held defendant was prejudiced even though the defendant was sentenced within the range previously stated by the court because the relevant question for prejudice was whether the defendant would have entered the plea knowing that the prosecutor would recommend the maximum punishment. Court found a reasonable probability that the defendant would not have pled guilty based on the defendant's indecision to plead until just prior to trial and reliance on the agreement. The court remanded but only for resentencing.

Jordan v. State, 374 S.E.2d 683 (S.C. 1988). Trial counsel found ineffective for failing to move to withdraw the guilty plea entered only because the prosecution promised not to oppose probation when in fact the prosecution reneged and vigorously opposed probation.

VI. PERFECTING APPEAL

Frasier v. State, 410 S.E.2d 572 (S.C. 1991). Trial counsel ineffective for failing to perfect the direct appeal after defendant informed him that he desired to appeal but could not afford cost of transcript. Counsel merely advised defendant to try to qualify for indigent status and took no further steps.

VII. APPEAL

Patrick v. State, 562 S.E.2d 609 (S.C. 2002). Appellate counsel ineffective in burglary, armed robbery, assault and battery with intent to kill, and unauthorized use of motor vehicle case for failing to adequately assert a claim of prosecutorial retaliation. Applicant was initially indicted in 1975. All of the charges except burglary were *nol prossed* prior to trial, and applicant was tried and convicted of burglary. Following reversal in 1992 in post-conviction proceedings, the State reindicted, tried, and convicted on all charges. Trial counsel adequately preserved the issue of vindictive prosecution. The same counsel on appeal, however, "devoted three short paragraphs to this issue, not give any useful analysis, and only cited one case." *Id.* at 611. The appellate court did not address this issue and instead simply held that the *nol prossed* charges could be brought since they were *nol prossed* before the jury was impaneled. Counsel did not address the retaliation argument in his petition for rehearing, and then when directed by the court to address the issue in a supplemental petition for rehearing, "counsel's argument was conclusory at best. He did not even mention the seminal case" that he had cited earlier in his brief. *Id.* at 611–12. Prejudice was found because this issue was a winner on appeal when analyzed under supreme court precedent (oddly enough, the one case that was cited by appellate counsel).

Ezell v. State, 548 S.E.2d 852 (S.C. 2001). Appellate counsel provided ineffective assistance for failing to adequately complete record in order to challenge admission of hearsay taped statements wherein non-testifying confidential informant identified applicant as the person who sold crack cocaine to the informant. Appellate counsel, who was also the trial counsel,

preserved the issue at trial and raised it on appeal, but failed to include the audio tape in the Record on Appeal. The post-conviction court found ineffective assistance and granted a new direct appeal. The supreme court found, however, that if the appellate court had been provided with the tapes during the appeal, the court would have granted a new trial because the evidence of guilt was not overwhelming and admission of the tapes was not harmless error. Thus, the appropriate remedy for the ineffective assistance of appellate counsel was a new trial.

Southerland v. State, 524 S.E.2d 833 (S.C. 1999). Appellate counsel provided ineffective assistance of counsel that required a new sentencing trial. Trial counsel requested an instruction on life without parole, but the trial court refused. Trial counsel then requested a charge that life is to be understood in its "ordinary and plain meaning," pursuant to *State v. Norris*, 328 S.E.2d 339 (S.C. 1985) (requiring instruction when the issue of parole was raised), and the trial court also denied that request. *Id.* at 835. Appellate counsel raised only the life without parole issue, but the court affirmed because the State had not argued future dangerousness and this instruction was not required under *Simmons v. South Carolina*, 512 U.S. 154 (1994). If appellate counsel had asserted the *Norris* claim, reversal would have been required because the portion of the subsequent opinion in *State v. Atkins*, 360 S.E.2d 302 (S.C. 1987), requiring that the court give the charge upon request by the defense was applicable. Prejudice found because failure to give the ordinary and plain meaning charge upon request requires automatic reversal under state law.

Simpkins v. State, 401 S.E.2d 142 (S.C. 1991). Appellate counsel found ineffective for failing to raise an obvious reversible error on direct appeal, i.e., the guardian ad litem of the child criminal sexual assault victim was the only person to testify regarding the identity of the perpetrator and the details of the incident.

VIII. PROBATION REVOCATION

Nichols v. State, 417 S.E.2d 860 (S.C. 1992). Counsel found ineffective at proceeding to revoke probation for failing to make

restitutionary payments because counsel did not object to State's failure to present evidence that the unemployed defendant had not made a bona fide effort to pay.

IX. CONFLICTS OF INTEREST

Lomax v. State, 665 S.E.2d 164 (S.C. 2008). Counsel in drug case plea had an actual conflict of interest due to counsel's simultaneous representation and plea of the petitioner's husband on related offenses arising from the same facts. In essence, the petitioner was initially arrested for distribution to an undercover officer and had three subsequent similar distributions. Her husband's charges arose from removing the drugs and money from their home after her initial arrest and prior to execution of a search warrant for their home. Nonetheless, counsel spent more time preparing the husband's case, even though the petitioner was charged with the majority of the offenses and faced a more severe sentence. Counsel also advised the husband of the conflict, but could not recall whether she advised petitioner. Counsel also argued for leniency, specifically arguing his limited involvement as compared to the petitioner, and then argued reconsideration of sentencing for the husband, but did not argue for leniency or reconsideration for the defendant. The husband was sentenced to three years, while the petitioner was given concurrent sentences ranging between five and twenty-five years. Counsel's actual conflict was also clear in that the petitioner pleaded guilty to the majority of the drug charges while the husband plead guilty to a single count because counsel was able to convince the prosecutor to dismiss additional charges for him, which "essentially pitted [h]usband against [p]etitioner, which was clearly detrimental to [p]etitioner's interests." *Id.* at 168.

Staggs v. State, 643 S.E.2d 690 (S.C. 2007). Counsel in murder case had an actual conflict that adversely affected his performance at trial where counsel also simultaneously represented the defendant's father, mother, and brother who were charged as accessories after the fact. The defendant did not testify at trial based on trial counsel's advice to him that he wanted to preserve the right to the final closing argument. Counsel had told the defendant's father and sister-in-law,

however, that he would not allow the defendant to testify and they should encourage him not to because his testimony could harm his family members' cases.

State v. Gregory, 612 S.E.2d 449 (S.C. 2005). The trial court erred in denying counsel's motion to withdraw and to allow the defendant a continuance in a lewd acts case. After counsel began representation of the defendant, counsel began representing the prosecutor in his case in her own divorce action. After counsel began negotiating for the defendant, the defendant was indicted on an additional charge. Counsel moved to withdraw on the morning of trial because the defendant's confidence in his abilities was diminished. The court denied the motion and ordered only that a different prosecutor would try the case. The trial court erred because there was an actual conflict of interest due to counsel's divided loyalties. Prejudice presumed.

Thomas v. State, 551 S.E.2d 254 (S.C. 2001). Counsel in drug case had an actual conflict where counsel represented husband and wife charged with drug trafficking. Counsel initially informed the defendant about dangers of joint representation and received a waiver. Later, however, the prosecutor offered a deal to allow both to plead to lesser offenses for an eight-year sentence, or to allow one to plead guilty to all and receive the maximum sentence while the other had charges dismissed. The wife pled guilty and received the maximum sentence, and charges against her husband were dismissed. Counsel acted on his divided loyalty by failing to advise the defendant, whom he believed to be the less culpable of the two, that she had nothing to lose by proceeding to trial since she was receiving the maximum punishment in the plea agreement.

> Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict. To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.

Id. at 256.

Edgemon v. State, 455 S.E.2d 500 (S.C. 1995). Counsel in

burglary case had an actual conflict that adversely affected representation where counsel represented defendant and two co-defendants. Initially, the State was negotiating with both co-defendants to plead guilty and testify against the defendant. One of the co-defendants entered an agreement to testify against defendant in exchange for Pretrial Intervention (ultimate dismissal of charges possible). Defendant ultimately pled guilty. Counsel testified in post-conviction that he did not negotiate the codefendants' deals but did emphasize to the prosecutor that the codefendants were less culpable than the defendant. Counsel should have withdrawn from the joint representation.

Carter v. State, 362 S.E.2d 20 (S.C. 1987). Trial counsel should not be appointed in post-conviction proceedings unless the applicant was specifically advised of the hazards of being represented by trial counsel and waived the issue.